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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

ROBERT SAWYER,

Petitioner,

v.

LARRY SMITH, Interim Warden,
Louisiana State Penitentiary,

Respondent.

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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147/142

TABLE OF CONTENTS

	Page
Opinion of the En Banc Court Below Sawyer v. Butler, No. 87-3274, slip op. at 5528 (5th Cir. Aug. 15, 1989)	A-1
Letter from En Banc Court Requesting Supplemental Briefs on <u>Teague</u> v. <u>Lane</u> Issues	A-41
Closing Arguments and Jury Instructions in the Capital Sentencing Hearing	A-43
Opinion of the Fifth Circuit Panel Sawyer v. Butler, 848 F.2d 582 (5th Cir. 1988) (vacated in part by en banc opinion)	A-59
Opinion of the District Court Sawyer v. Blackburn, 86-223 (E.D. La. April 8, 1987) (order, memorandum opinion, and judgment)	A-84
Magistrate's Findings and Recommendations Sawyer v. Blackburn, 86-223 (E.D. La. Sept. 9, 1987) (adopted with modifications by district court)	A-91
La. Code Crim. Procedure, Art. 905.8	A-141
La. Code Crim. Procedure, Art. 905.9	A-142
La. Supreme Court Rule 28	A-142
Supreme Court Opinions in Death Penalty Cases Since <u>Witherspoon</u> v. <u>Illinois</u>	A-144

SAWYER v. BUTLER 5528

Robert SAWYER, Petitioner-Appellant,
v.

Robert H. BUTLER, Sr., Warden,
Louisiana State Penitentiary,
Respondent-Appellee.

No. 87-3274.

United States Court of Appeals,
Fifth Circuit.

Aug. 15, 1989.

State prisoner sought habeas corpus. The United States District Court for the Eastern District of Louisiana, Henry A. Mentz, Jr., J., denied relief and defendant appealed. The Court of Appeals, 848 F.2d 582, affirmed. On petition for rehearing, the Court of Appeals, Patrick E. Higginbotham, Circuit Judge, held that: (1) claim that prosecutor's closing argument misled the jury as to its responsibility for imposition of the death penalty could not be raised in federal habeas corpus proceeding with respect to conviction which occurred prior to the United States Supreme Court *Caldwell* decision, and (2) argument did not violate the fundamental fairness restriction of *Donnelly*.

Affirmed.

King, Circuit Judge, filed a dissenting opinion in which Reavley, Politz, Johnson, and Jerre S. Williams, Circuit Judges, joined and to which Alvin B. Rubin, Senior Circuit Judge, viewing himself ineligible to participate following conference, adhered.

1. Habeas Corpus ¶791

Habeas corpus petitioners are precluded from seeking to overturn their conviction

on the basis of rules which are new by comparison with the date their convictions became final.

2. Habeas Corpus ¶791

Habeas corpus petitioner may rely upon a rule which is new in comparison to his conviction if it would place certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe or would exempt certain persons entirely from capital punishment, or when the new rule requires observance of those procedures which are implicit in the concept of ordered liberty.

3. Habeas Corpus ¶794

Court would consider merits of petitioner's interpretation of Supreme Court opinion issued after his conviction before determining whether he could rely on that opinion to overturn his sentence of death.

4. Criminal Law ¶1208.1(6)

Sentencing jury must feel the weight of responsibility in imposing death sentence so long as it has responsibility; lifting the sense of responsibility frustrates the core contribution of the jury and the cardinal justification for its role; for jury to see itself as advisory when it is not, or to be comforted by a belief that its decision will not have effect unless others make the same decision, is a frustration of the essence of jury function.

5. Criminal Law ¶977(1)

Whether jury or judge decides sentence, responsibility to decide must be adjoined to the power to decide.

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6. Criminal Law ¶713, 1171.1(6)

State cannot resist conclusion that it improperly diminished jury's sense of responsibility in its sentencing role with the argument that jury with such a diminished responsibility nonetheless did not render the proceedings fundamentally unfair.

7. Criminal Law ¶728(1), 730(1)

Absence of objection and absence of trial judge's participation with respect to prosecutor's argument which diminishes jury's responsibility for imposing the death penalty are relevant to the question of whether the jury was misled, but their absence is not determinative as a matter of law of the question of whether the state did mislead the jury.

8. Criminal Law ¶713

Prosecutor's statements to the jury which accurately describe its role in the imposition of the death penalty will not support a claim that the jury's sense of responsibility has been improperly diminished, but a statement can be literally true but quite misleading, such as by failing to disclose information essential to make that which is not said not misleading.

9. Criminal Law ¶1030(1)

Essence of the doctrine of plain error is that a loss of fundamental rights outweighs the values behind rules insisting upon an objection.

10. Habeas Corpus ¶774

Whether to insist upon contemporaneous objection as a matter of orderliness is a matter for the state court.

11. Jury ¶117

Timely objection is an essential element of a claim of racial discrimination in the exercise of peremptory challenges.

12. Criminal Law ¶1208.1(6)

Although prosecutor's argument will often be the natural point of departure in considering whether jury's sense of responsibility for imposition of death penalty has been improperly diminished, court must also look to opposing argument and to the instructions of the court, both in its formal charge and in any rulings on objections.

13. Criminal Law ¶1208.1(4, 6)

In determining whether jury's sense of responsibility for imposition of death penalty has been improperly diminished, inquiry is whether, under all the facts and circumstances, including the entire trial record, the state has misled the jury regarding its role under state law to believe that the responsibility for determining the appropriateness of defendant's death rests elsewhere.

14. Habeas Corpus ¶447

Federal court's role in habeas attack on state court conviction is only to review for errors of constitutional magnitude.

15. Habeas Corpus ¶447, 508

There is no fundamental unfairness inherent in refusing to yield federal power to upset state court convictions and sentences of death arrived at in complete conformity to constitutional standards in place when the convictions became final.

16. Habeas Corpus ¶462

Neither finality nor federalism will condone constitutional acquiescence in the

conviction of persons factually innocent of the crime charged.

17. Habeas Corpus ¶794

When a new rule is dictated by precedent, state can reasonably be asked to anticipate its articulation, and enforcing the rule in a subsequent habeas corpus proceeding involving a person convicted prior to the announcement of the rule does not intrude upon the state's legitimate interest in the finality of convictions, but new rule's application must otherwise be barred.

18. Habeas Corpus ¶794

Supreme Court *Caldwell* decision dealing with prosecutor's argument which diminishes jury's sense of responsibility for imposition of the death penalty was a new rule for purposes of determining whether it could be applied in habeas corpus proceeding to person whose state conviction occurred prior to its announcement, even if state law had provided a similar rule, as the Supreme Court's decision was new in its conclusion that the arguments violated the Eighth Amendment and went beyond prior decisions dealing with fundamental fairness of such jury arguments. U.S.C.A. Const. Amend. 8.

19. Habeas Corpus ¶794

Habeas petitioner may not escape limitation of use of a new rule by confining his attack to the jury's decision to impose a death rather than life sentence.

1. When this case was orally argued before and considered by the court, Judge Rubin was in regular active service. He participated in both the oral argument and the en banc conference, and with Judge King in the preparation of her dissenting opinion. He took senior status, however, on July 1, 1989. Based on his understanding of the Supreme

20. Criminal Law ¶723(1), 1208.1(4)

Prosecutor's closing argument indicating that jury's decision to impose the death penalty would be reviewed did not render death sentence fundamentally unfair.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before CLARK, Chief Judge, GEE, REAVLEY, POLITZ, KING, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH and DUHE, Circuit Judges.¹

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Robert Sawyer was sentenced to death by a Louisiana jury on September 19, 1980 for the brutal slaying of Frances Arwood. Today we decide his appeal from the denial by a United States District Court of his petition for writ of habeas corpus. We have elsewhere recorded the long history of Sawyer's efforts to overturn his conviction.² Sawyer's attack has now boiled down to three arguments. First, he argues that his court-appointed trial counsel was ineffective in certain respects. Second, and closely related to the first, he argues that his conviction should be set aside because his appointed counsel had not been licensed for five years as required by La. Code Crim.P. art. 512. Finally, he argues that the prosecutor in closing argument misled

Court decision in *United States v. American-Foreign Steamship Corp.*, 363 U.S. 685, 80 S.Ct. 1336, 4 L.Ed.2d 1491 (1960), he considers himself ineligible to participate in the decision of this case, but he adheres to the views in Judge King's dissent.

2. *Sawyer v. Butler*, 848 F.2d 582 (5th Cir. 1988).

the jury about its role in capital sentencing as condemned by *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985).

A panel of this court rejected Sawyer's contentions, dividing over the *Caldwell* issue, and we took the case *en banc*. We reject Sawyer's first two contentions for the reasons stated by the panel, affirm the district court's denial of Sawyer's petition for relief from his conviction, and turn to the difficult question of whether Sawyer is entitled to a new sentencing hearing because the state misled the jury about the jury's responsibility in deciding whether Sawyer should be executed.

Part I summarizes the facts. In Part II we sketch the constitutional principles that frame our inquiry. We next in Part III address the statutory overlay to the constitutional issues, as presented by the Supreme Court's recent decision in *Teague v. Lane*, — U.S. —, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). Because we conclude that we cannot apply *Teague* without first defining the scope of *Caldwell*, we turn back in Part IV to the substantive constitutional questions. We endorse a version of Sawyer's construction of *Caldwell*. We find in Part V, however, that *Caldwell* so defined is a new rule within the meaning of *Teague*, and that *Caldwell* does not fit within either of *Teague*'s two exceptions. Sawyer's *Caldwell* argument is therefore *Teague*-barred. The prosecutorial argument complained of will thus vitiate Sawyer's death sentence only if Sawyer can prevail under the earlier rule of *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). In Part VI we conclude that Sawyer has no *Donnelly* claim. We therefore affirm denial of Sawyer's petition to vacate his sentence.

I

Caldwell addressed constitutional issues that arise when a prosecutor misleads a capital jury about its responsibility for the sentencing decision. The prosecutor's argument creates a possibility that the jury will decide between life and death without an appropriate sense of grave responsibility. Sawyer contends that *Caldwell* mandates a new sentencing trial any time a prosecutor taints the proceeding with a *Caldwell*-type argument, unless the argument had "no effect" upon the jury. Louisiana, however, says that a *Caldwell*-type prosecutorial argument will not generate constitutional grounds for reversal unless the argument rendered the sentencing phase "fundamentally unfair" to the defendant. Louisiana would have us focus upon effective prejudice to the defendant, rather than effective dilution of the jury's sense of responsibility. The case turns upon this disagreement.

Sawyer's *Caldwell* claim arises out of remarks which the prosecutor made in his closing argument during the trial's sentencing phase. The details of the prosecutorial remarks are important to Sawyer's argument. We therefore repeat those remarks here. The prosecutor told the jury,

The law provides that if you find one of these circumstances then what you are doing as a juror, you yourself will not be sentencing Robert Sawyer to the electric chair. What you are saying to this Court, to the people of this Parish, to any appellate court, the Supreme Court of this State, the Supreme Court possibly of the United States, that you the people as a fact finding body from all the facts and evidence you have heard in relationship to this man's conduct are of the opinion that there are aggravating

circumstances as defined by the statute, by the State Legislature that this is a type of crime that deserves that penalty. It is merely a recommendation so try as he may, if Mr. Weidner tells you that each and every one of you I hope can live with your conscience and try and play upon your emotions, you cannot deny, it is a difficult decision. No one likes to make those [sic] type of decision but you have to realize if but for this man's actions, but for the type of life that he has decided to live, if of his own free choosing, I wouldn't be here presenting evidence and making argument to you. You wouldn't have to make the decision [emphasis supplied].

The prosecutor drew the jury's attention to the brutal nature of the crime for which Sawyer stood convicted. The prosecutor then returned to the theme of the jury's responsibility, saying

There is really not a whole lot that can be said at this point in time that hasn't already been said and done. The decision is in your hands. You are the people that are going to take the initial step and only the initial step and all you are saying to this court, to the people of this Parish, to this man, to all the judges that are going to review this case after this day, is that you the people do not agree and will not tolerate an individual to commit such a heinous and atrocious crime to degrade such a fellow human being without the authority and impact of the law of Louisiana. All you are saying is that this man from his actions could be prosecuted to the fullest extent of the law. No more and no less [emphasis supplied].

3. This word was likely recorded inaccurately by the stenographer. From context, it is clear that the prosecutor said, "It's all you're

After arguing that a death penalty was justified in Sawyer's case, the prosecutor struck the theme of jury responsibility again, telling the jury that their mistakes could be corrected by later decision-makers:

It's all your³ doing. Don't feel otherwise. Don't feel like you are the one, because it is very easy for defense lawyers to try and make each and every one of you feel like you are pulling the switch. That is not so. It is not so and if you are wrong in your decision believe me, believe me there will be others who will be behind you to either agree with you or to say you are wrong so I ask that you do have the courage of your convictions [emphasis supplied].

II

The problem of *Caldwell* error touches upon three of the Constitution's grandest themes. Two of these are obvious. The problem implicates federalism, because the state asserts a power to decide for itself questions of criminal procedure. *Caldwell* analysis also concerns individual rights, since the defendant contends that diminishing a capital jury's sense of responsibility subjects him to cruel and unusual punishment. The third theme is perhaps less obvious, but no less important to understanding the issues raised by a *Caldwell* claim. *Caldwell* touches the principle of popular self-government, because the direct expression of popular sentiment through juries remains an important aspect of the people's participation in the government, and a crucial check upon the state's

doing." The two phrases sound identical, but their meanings are nearly opposite.

authority to define the limits of crime and punishment.

The jury seems always to be at the center of the judicial struggle with the death penalty. This should not be surprising. Differences over the role of the jury reflect differences over the wisdom of the penalty itself. The legislative judgment specifying execution as the punishment appropriate to certain crimes embodies a confidence both about the moral principles of the community and about the capacity of the criminal justice system to resolve factual disputes. Coupled to that confidence must be an equal certitude that the jury will be able to bring the community's principles to bear, and so judge blame and guilt accurately in the individual case.

In *McGautha v. California*, 402 U.S. 183, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1971), Justice Harlan summarized how history had given expression to this deep link between the death penalty and the jury. Justice Harlan explained that legislatures "to meet the problem of jury nullification . . . did not try, as before, to refine further the definition of capital homicides. Instead, they adopted the method of forthrightly granting juries the discretion which they had been exercising in fact." *Id.* at 199, 91 S.Ct. at 1463. Justice Harlan observed that the Court had earlier concluded that "one of the most important functions any jury can perform in making such a selection is to maintain a link between contemporary and community values and the penal system—a link without which the determination of punishment could hardly reflect the evolving standards of decency that mark the progress of a maturing society." *Id.* at 202, 91 S.Ct. at 1464, quoting *Witherspoon v. Illinois*, 391 U.S. 510, 519 n. 15, 88 S.Ct. 1770, 1775 n. 15, 20 L.Ed.2d 776 (1968).

We have long recognized that decisions that depend essentially upon inarticulable judgment and common sense intuition are prime candidates for jury decision. Indeed, we refer to these judgments as "blackbox decisions." The sentencing decision in capital cases is born out of an inherent and unique mixture of anger, judgment and retribution, and requires a determination whether certain acts are so beyond the pale of community standards as to warrant the execution of their author. This decision to punish by death is a paradigmatic "black-box" call. To say that the decision can at best only be guided, not determined, by a judicial instruction or lawyers' argument underscores the decision's irreducible discretionary core.

A commitment to jury resolution of these blackbox decisions reflects a commitment to submit these issues to an active exercise of practical judgment, rather than to the reified precision of legal analysis. But the jury, of course, checks not only legalism but the government more generally. It protects from punishment those defendants who are innocent in the judgment of their peers. For both these reasons, the right to trial by jury has long been cherished within our legal tradition. Blackstone commended juries as an "admirable criterion of truth, and most important guardian both of public and private liberty." W. Blackstone, 4 *Commentaries* 407. The Constitution expressly secures the right to jury trial. It is, then, neither coincidental nor surprising that the jury's integrity should be so aggressively protected in capital cases, when the stakes are so high.

Of course, the Court has since rejected *McGautha's* teaching that "[t]o identify before the fact those characteristics . . . in language which can be fairly understood

and applied by the sentencing authority, appear to be tasks which are beyond present human ability." 402 U.S. at 204, 91 S.Ct. at 1466. The Court has demanded that states guide the jury's discretion. The Court has also permitted states to take some power away from the jury. But the jury's sense of gravity, and the responsible discretion it fosters, remain crucial to post-*McGautha* sentencing schemes. *Caldwell* articulates a constitutional protection against state conduct that diminishes the jury's perception of its awesome responsibility.

In this sense, *Caldwell* itself is but the trace of a more comprehensive rule, one that might have trusted jury discretion to protect individual rights and express the scope of state power. The Court's post-*McGautha* jurisprudence has instead sought to secure individual rights by limiting jury discretion, and has deferred to the states' own restrictions upon jury power. The Constitution, after all, permits the people to speak through state law as well as through juries. Federalism, no less than jury participation, ties local penalties to local sentiment and local judgment.

Nonetheless, it is necessary to perceive the larger theme in order to understand its trace within the composition that remains. *Caldwell* stands in part for the continuing vigor of the ideals articulated by Justice Harlan in *McGautha*. *Caldwell* treats jury discretion within a framework that recognizes both federal and state limits upon the jury's power. But it is the larger whole behind the trace which accounts for *Caldwell's* peculiar nexus to the constitutional mix of individual autonomy, federalism, and populism.

Indeed, this reflection of *McGautha's* ideals in *Caldwell* forms the lynchpin of

Sawyer's argument here, and was the fulcrum for the argument that divided our panel. Only if *Caldwell* harkens back to the high esteem which *McGautha* accorded jury discretion can *Caldwell* impose, as Sawyer would have it, considerably more stringent restrictions than its Due Process Clause precursor, *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). *Donnelly* subjected prosecutorial argument to a generalized "fundamental fairness" standard, which would benefit Sawyer only were he able to show actual prejudice from the argument complained of. Sawyer's principal argument presupposes that the Eighth Amendment, as interpreted by *Caldwell*, puts a particular premium upon responsible jury discretion in a proceeding that fixes punishment at life or death. It is that premium which would, on Sawyer's argument, distinguish *Caldwell* from *Donnelly*. The existence of that premium in turn assumes that a jury's deliberation may be even more crucial at the punishment phase than it is in choosing between guilt and innocence. That assumption makes sense only if, as Justice Harlan argued in *McGautha*, the jury's capacity to express moral sentiment directly is peculiarly essential to questions of capital blameworthiness.

[1] Because Sawyer's claim comes before us by way of a habeas petition, not by direct appeal, we view the delicate constitutional mix through a similarly complex statutory overlay. The law of the habeas writ balances the vindication of constitutional rights against the state's constitutionally legitimate interest in maintaining a criminal justice system capable of producing final convictions. The Supreme Court refined anew this balance in *Teague v. Lane*, — U.S. —, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). *Teague's* rule precludes habe-

as petitioners from seeking to overturn their convictions on the basis of rules new by comparison with the date their convictions became final. This statutory balance provides, however, exceptions for constitutional claims of a certain character. It may therefore wrap back around the constitutional issues, and so, in Sawyer's case, back around the questions about jury responsibility in capital cases. Yet a plurality, at least, of the *Teague* Court regarded the *Teague* retroactivity inquiry as a preemptive threshold to constitutional analysis. 109 S.Ct. at 1069. *Accord, Penry v. Lynaugh*, — U.S. —, 109 S.Ct. 2934, 2944, — L.Ed.2d — (1989) (applying *Teague* as threshold barrier to constitutional analysis). Because *Teague* may present a threshold barrier to fuller consideration of Sawyer's constitutional claims, we begin our analysis with that case.

III

The Supreme Court did not decide *Teague* until after the *en banc* court heard oral argument in this case. At our request the parties have filed briefs regarding *Teague*'s applicability to Sawyer's petition.

[2] *Teague* adopts much of what Justice Harlan long advocated as the correct view of federal habeas. Under *Teague* a federal habeas petitioner attacking a final state conviction may rely only upon the law in effect when his conviction became final. There are two exceptions. First, the petitioner may rely upon a new rule if it would place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Id.*, 109 S.Ct. at 1073 (quoting *Mackey v. United States*, 401 U.S. 667, 692, 91 S.Ct. 1160, 1175, 28 L.Ed.2d 404 (1971) (Harlan, J., concurring in part and

dissenting in part)). The Court has since declared that this first exception also applies to rules which exempt certain persons entirely from capital punishment. *Penry*, 109 S.Ct. at 2955. Second, the petitioner may rely on a new rule requiring the observance of "those procedures that ... are 'implicit in the concept of ordered liberty'" *Teague*, 109 S.Ct. at 1073, quoting *Mackey*, 401 U.S. at 693, 91 S.Ct. at 1180 (opinion of Harlan, J.) (inside quote from *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937) (Cardozo, J.)).

A majority of the *Teague* court fully subscribed to this restriction on the use of federal habeas to attack final state court convictions. *Teague* left much of the restriction's content in doubt, although some of that ambiguity was removed by the Court's later decision in *Penry v. Lynaugh*, 109 S.Ct. 2934, 2944 (opinion of O'Connor, J., for the Court). In *Teague* itself, four justices concluded, in an opinion by Justice O'Connor, that the second proviso, drawn from Cardozo's incorporation formulation, should be modified to limit its scope "to those new procedures without which the likelihood of an accurate conviction is seriously diminished." 109 S.Ct. at 1076-77. The remaining justices filed four separate opinions: Justice White concurred separately, as did Justice Stevens; Justice Blackmun joined part of Justice Stevens's opinion, and added a brief writing of his own; and Justices Brennan and Marshall dissented.

Teague was not a capital case, and the plurality disclaimed any decision regarding its application to an effort by a state prisoner to overturn his death sentence. Justice Stevens joined Justice O'Connor's opinion insofar as it adopted Justice Harlan's restrictions on federal habeas. He dissent-

ed, however, from the plurality's insistence that "the only procedural errors deserving correction on collateral review are those that undermine 'an accurate determination of innocence or guilt'..." *Id.* at 1081. He suggested that "a touchstone of factual innocence would provide little guidance in certain important types of cases, such as those challenging the constitutionality of capital sentencing hearings." *Id.* Justice Stevens noted that Justice Harlan's interest in making convictions final was "an interest that is wholly inapplicable to the capital sentencing context." *Id.* at 1081 n. 3. Justice O'Connor's plurality opinion replied that because *Teague* was not himself under a death sentence, the Court need not express any opinion "as to how the retroactivity approach we adopt today is to be applied in the capital sentencing context. We do, however, disagree with Justice Stevens's suggestion.... As we have often stated, a criminal judgment necessarily includes the sentence imposed upon the defendant." *Id.* at 1077 n. 3.⁴

Note three did not gain majority support, since Justice White neither joined it nor otherwise mentioned *Teague*'s application to death cases. Justice Brennan's dissenting opinion, joined by Justice Marshall, assumes that the plurality would apply the new limits to death cases, and observes that "the plurality's new rule apparently would not prevent capital defendants ... from raising Eighth Amendment, due process, and equal protection challenges to capital sentencing procedures on habeas corpus." *Id.* at 1089 n. 5.

The *Penry* decision settled *Teague*'s application to death cases. In Part II-A of her opinion for a fractured Court, Justice

O'Connor, joined by the Chief Justice and Justices White, Scalia, and Kennedy, held that *Teague* did apply to capital cases. The plurality simply observed that the finality concerns underlying the *Teague* doctrine hold equally well in capital cases, and offered no further analysis. The four remaining Justices dissented from the relevant portion of Justice O'Connor's opinion.

It remains unclear, however, whether *Teague* necessarily operates as a threshold barrier preempting full analysis of the constitutional claims asserted. The *Teague* plurality clearly thought that a *Teague* bar would preempt discussion of the constitutional merits. 109 S.Ct. at 1069-70, 1077. However, Justices Stevens and Blackmun, who joined the plurality to constitute a majority in favor of Justice Harlan's approach to retroactivity, expressly rejected the plurality's position on this matter. Justice Stevens, joined by Justice Blackmun, contended that the Court should proceed by "first determining whether the trial process violated any of the petitioner's constitutional rights and then deciding whether the petitioner is entitled to relief." Justice Stevens went on to observe that, absent a precise formulation of the rule in question, it may be difficult to determine whether the rule is in fact "new" at all. *Id.* at 1079-80 & n. 2. Finally, Justice White once again declined to join the relevant portion of the plurality opinion, leaving unclear his own position on the relation between the constitutional and *Teague* issues.

On this point, *Penry* leaves the matter unclear. A majority did join a portion of Justice O'Connor's opinion which characterized *Teague* as a rule to be applied "as a

death cases.

4. Justice Blackmun joined Justice Stevens's reservations about *Teague*'s applicability to

threshold matter." 109 S.Ct. at 2944 (Part II-A). Indeed, in Part IV-A all nine Justices joined a portion of the opinion which included a reference to *Teague* as a threshold test. *Id.* at 2952. We must take care, however, not to overstate the significance of these votes. Thus, although Justice Stevens joined Part IV-A of Justice O'Connor's opinion, he reiterated in a separate concurrence his view that the constitutional rule should be articulated before *Teague* is applied. The threshold character of the *Teague* bar was not the primary topic of Part II-A or Part IV-A, and it would be unwise to assume that each Justice joining those parts intended that *Teague* function as a threshold barrier in every case where it applied.

More importantly, however, Justice O'Connor's own opinion mixed the *Teague* inquiry with the constitutional questions. In order to decide that Penry's requested rule was dictated by precedent, and so not new, she had to decide precisely the substantive question which divided the Justices five-to-four over Part III of her opinion: that is, the question of whether Penry's proposed rule was the best possible interpretation—let alone the interpretation "dictated by"—Supreme Court precedent. 109 S.Ct. at 2944-46 (Part II-B). Likewise, Justice Scalia, dissenting in part and joined by the Chief Justice, Justice White and Justice Kennedy, observed that "[t]he merits of the mitigation issue, and the question of whether, in raising it on habeas, petitioner seeks application of a 'new rule' within the meaning of *Teague*, are obviously interrelated." 109 S.Ct. at 2964.

The relationships that led to a mixing of the *Teague* issues and the constitutional issues in *Penry* become all the more powerful when a petitioner attempts not to establish a new rule, but to rely, as Sawyer

would like to, upon a rule that is new by comparison to his own conviction yet is well established by the time of his habeas petition. In such a case, a court may have to reach the constitutional questions even to define what the petitioner complains of—in Sawyer's case, for example, "*Caldwell* error." Moreover, the court does not risk the awkward outcome of establishing a new rule in a case where it has no application. See *Teague*, 109 S.Ct. at 1077-78. The rule relied upon—for example, the rule governing *Caldwell* error—exists by the time the *Teague* issues arise in connection with a particular prisoner's petition.

Indeed, Sawyer's argument illustrates the difficulties that may arise from an attempt to separate *Teague* analysis from the substance of the constitutional claims raised. Whether *Caldwell* is a new rule, and whether *Caldwell* is a rule "implicit in the concept of ordered liberty" that implicates factual innocence, both depend in part upon what *Caldwell* means, and, more specifically, upon the relation between *Caldwell* and *Donnelly*. This dependence is made unmistakably clear by Louisiana's briefing of the *Teague* issue, which suggests that *Teague* is no bar to Sawyer's *Caldwell* claim precisely because Sawyer is wrong about the relation between *Caldwell* and *Donnelly*. If the Supreme Court had made clear that *Teague* necessarily bars an inquiry into the merits of the petitioner's constitutional claims, we would perhaps have to resolve the *Teague* issues by a conditional discussion of *Teague*'s application to what Sawyer says *Caldwell* might mean. Such a conjectural analysis of possible rules would, however, entail considerable awkwardness, do nothing to clarify the substantive law, and defeat rather than serve judicial economy—which would be the ostensible goal of any version of *Teag-*

ue that preempted some constitutional inquiries.

[3] We thus choose to address the merits of Sawyer's interpretation of *Caldwell* before applying *Teague* to *Caldwell*. We do not mean, however, by adopting this strategy to suggest that *Teague* never bars inquiry into the constitutional merits of a petitioner's claim. It remains possible that an application of *Teague* to a conjectural rule may be appropriate in cases where the *Teague* issues do not turn, as they do here, upon a highly precise specification of the rule in question. We leave that issue for a case in which it is properly presented, and turn to the merits of the constitutional arguments.

IV

[4] At a general level, *Caldwell*'s import is clear. Regardless of whether the Court moves toward or away from the *McGautha* acceptance of juror discretion, the sentencing jury must continue to feel the weight of responsibility so long as it has responsibility. Lifting the sense of responsibility frustrates the core contribution of the jury and the cardinal justification for its role. For the jury to see itself as advisory when it is not, or to be comforted by a belief that its decision will not have effect unless others make the same decision, is a frustration of the essence of the jury function. It is not surprising then that jury arguments calculated to have that effect have long been condemned by numerous jurisdictions. See *Caldwell*, 105 S.Ct. at 2642 nn. 4 & 5. See also Mello, *Taking Caldwell v. Mississippi Seriously*, 30 B.C.L.Rev. 283, 305-308 & nn. 100-114 (1989). The decision of the Court in *Caldwell* reflects this reality, insight born more

of experience than of empirical study or abstract exposition.

[5] In no way is the importance of *Caldwell* error diminished by the possibility that a state may dispense with the jury's sentencing power in capital cases. See *Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984). The evil of *Caldwell*-type prosecutorial arguments is not that they divest juries of their responsibility, but rather that they distort the jury's understanding of a power which it in fact retains. The decision-maker empowered to choose between life and death must not be relieved of the gravity attending that choice. Whether a judge or jury decides the sentence, the responsibility to decide must remain adjoined to the power to decide. It would, of course, be less likely that a prosecutor could mislead a judge, whose own knowledge of the law should overcome any misleading argument. But a judge who misunderstands the sentencing decision in a capital case creates a Constitutional defect no less significant than a jury which misunderstands its decision. Cf. *Hickerson v. Maggio*, 691 F.2d 792, 794-95 (5th Cir.1982).

The argument between Sawyer and Louisiana does not draw into question these general observations. Sawyer contends that *Caldwell*, recognizing the unique role of the jury in capital sentencing, imposes an especially stringent procedural safeguard by requiring that the defendant receive a new sentencing hearing if the prosecutor's argument had any effect on the jury's perception of its own responsibility. Louisiana concedes the impropriety of prosecutorial argument that misleads the jury as to its role, but contends that the sentencing phase is marred by a constitutional defect only if the prosecutorial argument

rendered it "fundamentally unfair." According to Louisiana, *Caldwell* did not establish a "no effect" test for constitutional error, but simply applied *Donnelly*'s "fundamental fairness" test to the facts of a sentencing hearing. On this argument, *Caldwell* extends *Donnelly* to punishment proceedings without altering *Donnelly*'s rule by any reaffirmation of *McGautha*'s reflections upon jury responsibility.

It is this argument which brought the case before the *en banc* court. To resolve it, we must consider *Caldwell* in some detail. We begin with the facts.

Caldwell killed the owner of a grocery store in the course of a robbery. His lawyers' plea for mercy at the sentencing phase of his capital murder trial rested on his poverty, troubled youth, and character evidence. His lawyers argued

[E]very life is precious and as long as there's life in the soul of a person, there is hope. There is hope, but life is one thing and death is final. So I implore you to think deeply about this matter. It is his life or death—the decision you're going to have to make, and I implore you to exercise your prerogative to spare the life of Bobby Caldwell. . . . I'm sure [the prosecutor is] going to say to you that Bobby Caldwell is not a merciful person, but I say unto you he is a human being. That he has a life that rests in your hands. You can give him life or you can give him death. It's going to be your decision. I don't know what else I can say to you but we live in a society where we are taught that an eye for an eye is not the solution. . . . You are the judges and you will have to decide his fate. It is an awesome responsibility, I know—an awesome responsibility.

Caldwell, 105 S.Ct. at 2637. The argument triggered the following exchanges:

"ASSISTANT DISTRICT ATTORNEY: Ladies and gentlemen, I intend to be brief. I'm in complete disagreement with the approach the defense has taken. I don't think its fair. I think it's unfair. I think the lawyers know better. Now, they would have you believe that you're going to kill this man and they know—they know that your decision is not the final decision. My God, how unfair can you be? Your job is reviewable. They know it. Yet they . . .

"COUNSEL FOR DEFENDANT: Your Honor, I'm going to object to this statement. It's out of order.

"ASSISTANT DISTRICT ATTORNEY: Your Honor, throughout their argument, they said this panel was going to kill this man. I think that's terribly unfair.

"THE COURT: Alright, go on and make the full expression so the Jury will not be confused. I think it proper that the jury realizes that it is reviewable automatically as the death penalty commands. I think that information is now needed by the Jury so they will not be confused.

"ASSISTANT DISTRICT ATTORNEY: Throughout their remarks, they attempted to give you the opposite, sparing the truth. They said 'Thou shalt not kill.' If that applies to him, it applies to you, insinuating that your decision is the final decision and that they're gonna take Bobby Caldwell out in the front of this Courthouse in moments and string him up and that is terribly, terribly unfair. For they know, as I know, and as Judge Baker has told you, that the decision you render is automatically reviewable by the Supreme Court. Automatically, and I

think it's unfair and I don't mind telling them so."

Id. at 2637–38. A divided Mississippi Supreme Court affirmed and the Supreme Court granted certiorari. Speaking for the Court, Justice Marshall concluded that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Caldwell*, 105 S.Ct. at 2639. He explained that the court's post-*Furman* review of state procedures "has taken as a given that capital sentencers would view their task as the serious one of determining whether a specific human being should die at the hands of the State." *Id.* at 2640. He then found "specific reasons to fear substantial unreliability as well as bias in favor of death sentences when there are state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court." *Id.*

The State proposed three reasons why the prosecutor's argument should not upset the death sentence. The State argued that under *California v. Ramos*, 463 U.S. 992, 1001–06, 103 S.Ct. 3446, 3453–56, 77 L.Ed.2d 1171 (1983), it was free to instruct juries in capital cases about appellate processes. In part IV(a) of the *Caldwell* opinion, joined only by Justice Brennan, Justice Blackmun and Justice Stevens, Justice Marshall rejected this argument. He concluded that, unlike in *Ramos*, the argument in *Caldwell* was not relevant to a valid state penological interest and was misleading. In the *Caldwell* plurality's view, appellate review was simply not relevant to the juror's task of determining an appropriate sentence. For that reason, the prosecutor's argument that the jurors should view themselves as only taking a preliminary

step in the sentencing determination served no valid state interest. Justice O'Connor's concurring opinion agreed, but refused to read *Ramos* "to imply that the giving of nonmisleading and accurate information regarding the jury's role . . . is irrelevant to the sentencing decision." *Id.*, 105 S.Ct. at 2646 (O'Connor, J., concurring; emphasis in original). In her view the prosecutor's argument was impermissible because it misled "in a manner that diminished the jury's sense of responsibility." *Id.*

The Court next rejected the state's contention that the prosecutor's argument was a reasonable response to defense counsel's argument. The Court observed that the prosecutor's reference to appellate review did not respond to defense counsel's suggestion that a sentence of life would be without parole, nor to the defense's religious theme and plea for mercy.

Finally, and most importantly for our purposes, the Court rejected the State's contention that in any event the effect of the prosecutor's argument should be measured by the standard of *Donnelly v. DeChristoforo*, which would judge improper prosecutorial arguments to vitiate a sentencing proceeding only if they rendered the proceedings fundamentally unfair. The Court distinguished *Donnelly* on two grounds. First, the Court pointed out that in *Donnelly* the trial court gave a strong curative instruction to the jury, while in *Caldwell* the judge not only gave no correcting instruction but "stated to the jury that the remarks were proper." *Id.*, 105 S.Ct. at 2645. Second, in *Donnelly* the remarks were ambiguous and not focused pointedly upon "the principal concern" of our jurisprudence concerning the death penalty, the "procedure by which the State imposes the death sentence." *Id.* (quoting

California v. Ramos, 463 U.S. at 999, 103 S.Ct. at 3452).

Justice Rehnquist, joined by Justice White, dissented, contending that when the argument was placed in its full trial setting it "fell far short of telling the jury that it would not be responsible for imposing the death penalty." 105 S.Ct. at 2649 (Rehnquist, J., dissenting). Rather, "the thrust of the prosecutor's argument was that the jury was not *solely* responsible for petitioner's sentence." *Id.* at 2650 (emphasis in original). He observed that under *Ramos* there was nothing wrong with telling a jury that its decision is subject to appellate review, and that the prosecutor did not mislead the jury by suggesting that its decision would be subject to de novo review.

The division between the *Caldwell* majority and the dissenting Justices, like the division between Sawyer's argument and Louisiana's argument, turns in significant part upon the fate of *Donnelly*'s "fundamental fairness" formula in capital sentencing proceedings. As we shall see, the effect upon a death sentence of *Caldwell* error and the nature of the inquiry into whether it exists, including the record sources to be examined, are entwined parts of its very definition. That is, what a reviewing court is to look for and how it is to set about judging its effect upon a criminal conviction is part of the definition of *Caldwell* error. Much of the argument here is over the ingredients of the prohibition.

Sawyer, as we have said, argues that *Caldwell* modifies *Donnelly* by mixing in traces of the regard for jury decision-making so powerfully articulated in *McGautha*. Sawyer argues that the prosecutor's argument at the sentencing phase of his trial

misled the jury regarding its role. In particular, he contends that the argument unambiguously told the jury that its role was only to recommend punishment and that others would check their decision, an argument even more pointed than in *Caldwell*. Sawyer maintains that such an argument effectively renders a proceeding fundamentally unfair by definition, and that the standard of *Donnelly* is therefore inapplicable because superfluous. It follows, he argues, that he is entitled to a new sentencing hearing before a jury properly aware of its responsibility. According to Sawyer, neither a contemporaneous objection nor participation by the trial judge are prerequisites to a *Caldwell* claim. *Caldwell* mandates a new sentencing hearing so long as the court reviewing *Caldwell* error "cannot say that [the prosecutor's statements] had no effect on the sentencing decision." *Caldwell*, 472 U.S. at 328-329, 105 S.Ct. 2639-2640. Sawyer says that in *Kirkpatrick v. Blackburn*, 777 F.2d 272, 289-90 (5th Cir.1985), this court declared that "the no effect test applies to the state's effort to minimize the jury's sense of responsibility, not to every other improper argument." He maintains that the Supreme Court in *Darden v. Wainwright* adopted this court's position holding *Caldwell* applicable in any case where the prosecutor "mislead[s] the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision." *Darden*, 477 U.S. 168, 184 n. 15, 106 S.Ct. 2464, 2473 n. 15, 91 L.Ed.2d 144 (1986).

As already mentioned, Louisiana contends, in essence, that *Caldwell* merely applies *Donnelly* to a case where the combination of prosecutorial and judicial action at a sensitive moment rendered the proceedings especially unfair to the defendant.

Louisiana argues that no new sentencing hearing should be ordered unless we find both that there was *Caldwell* error and that it rendered the trial fundamentally unfair. Pointing to *Darden v. Wainwright*, the State argues that Sawyer must show prosecutorial misconduct that "so infected the trial as to deny due process." See *Darden*, 106 S.Ct. at 2472 (quoting *Donnelly v. DeChristoforo*). Louisiana argues that the due process standard is applicable because the prosecutor's argument, when stripped of non-misleading statements, was not as clear and focused as in *Caldwell*. Louisiana stresses the absence both of any objection by defense counsel and of any signal from the trial judge that might have endorsed the prosecutorial misstatement.

[6] We agree with Sawyer that *Caldwell* must be read in light of *McGautha*. The state cannot resist a conclusion that it improperly diminished a jury's sense of responsibility in its sentencing role with the argument that a jury with such diminished responsibility nonetheless did not render the proceedings fundamentally unfair. See, e.g., *Coleman v. Brown*, 802 F.2d 1227, 1238-41 (10th Cir.1986), *cert. denied*, 482 U.S. 909, 107 S.Ct. 2491, 96 L.Ed.2d 383 (1987); see also *Campbell v. Kincheloe*, 829 F.2d 1453, 1460-61 (9th Cir.1987), *cert. denied*, — U.S. —, 109 S.Ct. 380, 102 L.Ed.2d 369 (1988); *Dutton v. Brown*, 812 F.2d 593, 596-97 (10th Cir.1987) (en banc), *cert. denied*, — U.S. —, 108 S.Ct. 116, 98 L.Ed.2d 74 (1987); *Mann v. Dugger*, 844 F.2d 1446, 1457-58 (11th Cir.1988) (en banc). Cf. *Hopkinson v. Shillinger*, 866 F.2d 1185, 1226-33 (10th Cir.1989); *id.* at 1233-38 (Logan, J., dissenting). Once it is accepted that a death sentence by a jury with such a diminished sense of responsibility is "fundamentally incompatible with the

Eighth Amendment requirement that the jury make an individualized decision that death is the appropriate punishment in a specific case"—and the Supreme Court has told us precisely that, see *Darden*, 106 S.Ct. at 2473 n. 15,—it is apparent that, as Sawyer contends, the *Donnelly* issue of fundamental fairness is subsumed in the threshold question of whether there was *Caldwell* error.

[7] If the state has misled the jury in the manner condemned by *Caldwell*, it can be no answer that the culprit was the prosecutor and not the judge. With either source, the error is the same. Although in *Caldwell* there was an objection and a potent affirmation of the misleading argument by the trial judge, the relevance of these events was to the question of whether the jury was actually misled. In other words, the absence of objection and trial judge participation are highly relevant to the question of whether a jury was misled, but their absence is not determinative as a matter of law of the question of whether the state misled the jury. We do not read the Court's opinion in *Darden* to the contrary.

[8] "To establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." *Dugger v. Adams*, — U.S. —, 109 S.Ct. 1211, 1215, 103 L.Ed.2d 435 (1989). In short, a prosecutor's statements to the jury accurately describing its role will not support a *Caldwell* claim. At the same time, a statement can be literally true but quite misleading by failing, for example, to disclose information essential to make what was said not misleading. Indeed much of our law of fraud under the Securities Act

rests on just such a reality. See 17 C.F.R. 240.10b-5(b).

[9, 10] It is suggested that, in spite of these considerations, a willingness to find *Caldwell* error from unobjected to argument by a prosecutor unwise creates an incentive for defense counsel to not object. After all, an objection may lead to a curative instruction and any appellate point is not lost by remaining silent. The questionable validity of the assumed incentives aside, these concerns as well as the other values that lie behind our usual insistence that error be preserved are not unique to *Caldwell* error. The essence of the doctrine of plain error is that a loss of fundamental rights outweighs the values behind rules insisting upon an objection. More to the point, the decision to entertain claimed constitutional error without a contemporaneous objection belongs in the first instance to the state, when as here, we review a state court conviction. A state may insist upon a contemporaneous objection. And, ordinarily, a federal habeas court is bound by that decision and cannot reach claims of error found by the state to have been waived. *Dugger v. Adams*, 109 S.Ct. at 1215. In short, whether to insist upon a contemporaneous objection as a matter of orderliness, as distinguished from the question of whether an objection is an element of the constitutional claim itself, is a matter for the state court.

[11] It is suggested that even if the *Caldwell* issue must be addressed because the state reached its merits, a contemporaneous objection is an element of a *Caldwell* claim. We have concluded that a timely objection is an essential element of a claim of racial discrimination in the exercise of preemptory challenges under *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90

L.Ed.2d 69 (1986). *Jones v. Butler*, 864 F.2d 348, 369 (5th Cir.1988) (on petition for rehearing). But the constitutional rule in *Batson* rests on a change in the requirement of proof from that of *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965) (insisting upon proof of a pattern of discrimination by prosecutors in cases) to the case specific procedures of *Batson*. *Teague*, 109 S.Ct. at 1066. *Batson* assures an objecting defendant that a prosecutor striking black veniremen will articulate non-racial reasons for its decisions. An objection is plainly central to a *Batson* claim. *Caldwell*, by contrast, rests on "the assumption that a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its 'truly awesome responsibility.'" *Caldwell*, 105 S.Ct. at 2646. It instructs that if the State seeks "to minimize the jury's sense of responsibility for determining the appropriateness of death," and "we cannot say that this effort had no effect on the sentencing decision," then "that decision does not meet the standard of reliability that the Eighth Amendment requires." *Id.* In *Caldwell*, unlike in *Batson*, the constitutional defect—if it exists—is observable and measurable by a reviewing court even absent any objection. We reject the suggested analogy between these two very different doctrines.

In sum, we reject Louisiana's proffered definition of *Caldwell*. We do so after noting that its core is diminishing the responsibility of the jury by misdescribing its role under state law and after rejecting the suggestion that its elements include showings of fundamental unfairness, a contemporaneous objection or trial court participation.

[12, 13] Continuing our definition of *Caldwell* error, we turn to the question of what an appellate court looks to in gauging the state's conduct, and quickly find that the nature of the prohibition takes us a long way toward the answer. What has been communicated to the jury by the state cannot be disentangled from the total trial scene, and thus that is our terrain. While the prosecutor's argument will often be the natural point of departure, we must turn to the opposing argument and then to instructions of the court, both in its formal charge and in any rulings on objections. The initial focus will be upon the close of the sentencing hearing, yet inquiry may proceed not only to the guilt phase but to jury selection as well. In short, a trial cannot be cabined into distinct segments. As the Supreme Court phrased it: "not only is the challenged instruction but one of many such instructions, but the process of instruction itself is but one of several components of the trial which may result in the judgment of conviction." *Cupp v. Naughton*, 414 U.S. 141, 147, 94 S.Ct. 396, 400, 38 L.Ed.2d 368 (1973). We conclude that the inquiry is whether under all facts and circumstances, including the entire trial record, the state has misled the jury regarding its role under state law to believe that the responsibility for determining the appropriateness of defendant's death rests elsewhere.

While this is inevitably a case-by-case inquiry with a broad terrain to be surveyed, there are a number of events that obviously may loom large and quickly focus the inquiry. First, the trial judge is an extraordinarily puissant figure. A direct and uncorrected misstatement to the jury that misleads the jury regarding its role will be difficult to salvage. For example, *Caldwell* error was found by the Eleventh

Circuit when a trial judge told the jury that he was the ultimate determinant of whether the defendant was sentenced to death. The Circuit reached this conclusion even though the jury's role under Florida law is advisory. *Adams v. Wainwright*, 804 F.2d 1526, 1532-33 (1986), modified on denial of rehearing, 816 F.2d 1493 (1987), rev'd on other grounds, *Dugger v. Adams*, — U.S. —, 109 S.Ct. 1211, 103 L.Ed.2d 435 (1989). Second, the absence of objection by competent counsel may suggest that the argument as it played in the courtroom was less pointed than it now reads in the transcript. Third, the argument may take on a different hue when read as a reply to opposing counsel. Fourth, the court may have mitigated the effect of counsel's argument by instructing the jury that the judge is the sole source of the law and that the lawyer's arguments are not evidence. Fifth, veniremen often receive extensive instruction during voir dire. These instructions, as well as the questions and advices of counsel, are also relevant. Finally, through the course of trial the judge may give detailed instructions to the jury about its role. Such familiar instructions are part of the message to the jury and all must be considered. We list these lines of inquiry to explain the scope of inquiry that may be required in review of asserted *Caldwell* error, without suggesting that the list is exhaustive. By definition, it is not and cannot be. Indeed, in some cases the presence or absence of error will be readily determinable solely on the basis of the prosecutor's argument and the trial judge's treatment of it.

V

A

Sawyer's conviction was final at least by 1984 when the Supreme Court denied his

petition for certiorari. See *Sawyer v. Louisiana*, 466 U.S. 931, 104 S.Ct. 1719, 80 L.Ed.2d 191 (1984). Because Sawyer wishes to rely on the Court's later decision in *Caldwell*, he must grapple with the limitation of *Teague*. Sawyer first argues that *Teague* does not bar his argument because *Caldwell* did not announce a new rule, so that the prosecutor's argument was constitutionally infirm measured by the law in place in 1984 when his conviction became final.

The Supreme Court's decision in *Penry* left the definition of a "new rule" in some doubt. Justice O'Connor reiterated her statement, first presented in *Teague*, that a case "announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government, [or] to put it differently . . . if the result was not dictated by precedent." *Penry*, 109 S.Ct. at 2944 (quoting *Teague*, 109 S.Ct. at 1070 (plurality opinion)). Yet Justice O'Connor's application of this standard led Justice Scalia, joined by three colleagues, to contend that the Court had only given "lip-service" to the *Teague* standard. *Penry*, 109 S.Ct. at 2964 (opinion of Scalia, J., dissenting; Part II). Justice Scalia said that "it challenges the imagination to think that today's result is 'dictated' by our prior cases." *Id.* at 2965. He went on to say that "[i]f *Teague* does not apply to a claimed 'inherency' as vague and debatable as that in the present case, then it applies only to habeas requests for plain overruling," and went so far as to remark that "[i]t is rare that a principle of law as significant as that in *Teague* is adopted and gutted in the same term." *Id.* at 2965.

Justice Scalia's comments are especially significant because he speaks on behalf of all three Justices who joined Justice O'Connor's plurality opinion in *Teague*, and on

behalf of Justice White as well. Yet, Justice Brennan, in his separate *Penry* opinion, apparently does not agree with Justice Scalia that *Teague* has been gutted. Justice Brennan reiterates his contention, first made in his dissent from *Teague* itself, that the *Teague* rule is an "unprecedented curtailment of the reach of the Great Writ," and accuses the majority of compounding its errors by extending *Teague* to death cases.

Indeed, Justice O'Connor's application in *Penry* of *Teague*'s "new rule" formula may well have turned upon facts which she thought unique to *Penry*'s claims. In Justice O'Connor's view, *Penry* sought only to compel Texas "to fulfill the assurance upon which [*Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976)] was based: namely, that the special issues would be interpreted broadly enough to permit the sentencer to consider all of the relevant mitigating evidence a defendant might present in imposing sentence." 109 S.Ct. at 2945. *Penry*'s claim rested on the clearly established and specific Constitutional rule that "a State could not, consistent with the Eighth and Fourteenth Amendments, prevent the sentencer from considering and giving effect to evidence relevant to the defendant's background or character or to the offense that mitigates against imposing the death penalty." Justice O'Connor concluded that the path from *Jurek* to *Penry* involved the consistent application of an established constitutional rule to, in essence, changes in the facts.

Because of these disagreements about the meaning of the *Teague* test, the Court's opinions in *Teague* and *Penry* do not immediately yield a clearly articulable definition of a "new rule." We must interpret what Justice O'Connor has said by reference to

the purposes served by the *Teague* rule. To undertake that inquiry, we first turn to the complex of concerns now accommodated within federal habeas jurisprudence.

[14] A federal court's role in a habeas attack on a state court conviction is only to review for errors of constitutional magnitude. The Constitution commands us to defer to federalism, and so recognizes that the solemn judgment of a state's highest court enjoys a presumption of validity, which may be overcome only for failure to abide the Constitution itself. The role that remains for federal courts is by no means modest. To the contrary, viewed over the full span of history, it is rather an extraordinary reach for superintending power. Indeed, the first legislation empowering federal courts to issue a writ for state custody did not come until the Habeas Act of 1867. Until the Court's decision in *Brown v. Allen*, 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469 (1953), "federal courts would never consider the merits of a constitutional claim raised on habeas if the petitioner had a fair opportunity to raise his arguments in the original proceeding. . . ." Seen in this light, casting our role as that of a constitutional backstop is hardly a retrenchment, and *Teague*'s reach for finality is modest indeed.

[15] *Teague*, whether applied to a capital sentence or to a more ordinary case, is by no means a return to the law that preceded *Brown v. Allen*, if indeed it is a turn in that direction at all. *Teague* rather reflects a distinct and basic judgment that, putting aside the cases falling within its two provisos, there is no fundamental un-

fairness inherent in refusing to wield federal power to upset state court convictions and sentences of death arrived at in complete conformity to constitutional standards in place when the convictions became final. Due regard for the constitutional structure of federalism, and the protection it accords to state government, counsels the opposite—that only preservation of constitutional principles justifies the intrusion.

[16] The *Teague* judgment about the federal role acknowledges that neither finality nor federalism will condone constitutional acquiescence in the conviction of persons factually innocent of the crime charged. Our efforts to reduce the risk of convicting an innocent person are evidenced by myriad procedural safeguards and by high requirements of proof. These restrictions reflect a commitment to accurate outcomes so firm that we consciously increase the chance of acquitting guilty persons to reduce the chance of convicting the innocent. It is not surprising, then, that the Supreme Court is fairly unanimous in its view that a state court prisoner can rely upon a fundamental constitutional rule implicating factual innocence even though that rule was not announced until after his conviction became final.

It might nonetheless be contended that the Court's "factual innocence" proviso is not enough to vindicate the rights of prisoners, and that capital cases show particularly well various considerations that compel a narrow formulation of *Teague*'s "new rule" element. One reasoning along these lines might point to the inherent finality of the death penalty, and contend that the benefit of every announced consti-

5. See *Mackey v. United States*, 401 U.S. 667, 684, 91 S.Ct. 1160, 1175, 28 L.Ed.2d 404

(1971) (Harlan, J., concurring).

tutional rule should be given to a prisoner facing this extreme penalty. One might likewise argue that in habeas petitions challenging a death sentence but not the underlying conviction, the state need not fear that it will have to relitigate issues of innocence and guilt on the basis of state evidence, and so run the risk of freeing a criminal who would have been convicted by a fair and timely trial. Finally, continuing to reason against finality interests on the basis of concerns unique to death cases, one might argue that in such cases there is no danger that the state's efforts at rehabilitation will lose their focus because of the habeas process; that habeas petitioners succeed more frequently in capital cases than in other cases; and that other factors, external to the habeas system, are responsible for delays in the execution of state prisoners.

Yet unless we suppose a perfectly stable constitutional jurisprudence, it is unclear how finality could ever be achieved if these arguments are accepted at full reach. As the Court made clear in *Penry*, the order of magnitude of punishment is not relevant to *Teague*'s support of finality so long as we except rules implicating factual innocence. The "death is different" argument in this context is little more than an argument against the validity of the punishment itself. As an argument directed to the purposes of *Teague*—the matter now before us—it fails.

Of course, the penalty is different from all others in many respects. We recognize that it is the extreme of punishments when we reserve the punishment for the most extreme of crimes, as we do under our present law. Death sentences, which by their nature aim at retribution or deterrence and not at rehabilitation, obviously do implicate different state purposes than

do terms of incarceration. But that the interests are different does not imply that they are less deserving of federal deference, or that comity concerns are any less important. A state policy predicated upon the certainty of exact retribution, no less than a state policy predicated upon incarceration in a facility designed in part to rehabilitate, suffers when the prospect of punishment is confused by a series of collateral federal attacks.

Indeed, much that is unique about the law controlling death cases is in fact a powerful testament to the need for the finality-serving rules of *Teague*. The constitutionally secured rules announced for death cases by the Supreme Court since *McGautha v. California*, 402 U.S. 183, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1971), have come in such number and with such rapidity that the entire jurisprudence is fairly described as being in a state of flux. During the ten year period ending with the final day of the Supreme Court's 1988 term, it granted plenary review in sixty-seven cases and at least thirty-five of those can, with little dissent, be described as presenting issues of substantial reach. The destabilizing impact of such a sea-change in controlling law presents problems of administration unique to death cases. In the 1986 term alone, the Supreme Court acted on eighty requests for stay of execution. This undermines the argument that *Teague* has no application to death cases.

Nor is there anything inhumane in an insistence that a death-sentenced state prisoner confine his attack upon that sentence to the rules in effect when his conviction became final. So long as nothing new implicates the petitioner's factual innocence, we, confronted with the need for sureness

of punishment as contrasted with the never ending uncertainty and serendipitous state of a nigh open set of rules, see little to persuade us that respect for human dignity counsels against application of finality rules.

[17] In light of the powerful reasons that justify the *Teague* doctrine, we see no cause to limit its application to the rare or extraordinary case. When a rule is indeed dictated by precedent—a word Justice O'Connor took care to emphasize in *Penry* as she did in *Teague*—then a state can reasonably be asked to anticipate its articulation, and enforcing the rule in a habeas proceeding will not intrude upon the state's legitimate interest in the finality of convictions. Otherwise, however, *Teague* must bar the rule's application. We do not, despite Justice Scalia's strong words in dissent, read *Penry* to the contrary. Instead, we believe that Justice O'Connor regarded *Penry* as a special case, one simply reapplying the rule of *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976) to a unique development in state law. See *Penry*, 109 S.Ct. at 2945 (Opinion of O'Connor, J., Part II-B, discussing *Jurek*). Justice O'Connor honored the language of the *Teague* opinion, and we must assume she intended to honor its spirit as well.

B

Sawyer correctly observes that many state courts, including Louisiana, had before *Caldwell* developed common law rules forbidding misleading jury argument about the importance of the jury's decision. See, e.g., *Pait v. State*, 112 So.2d 380, 383-84 (Fla.1959); *Blackwell v. State*, 76 Fla. 124, 79 So. 731, 731, 735-736 (1918); *Wiley v. State*, 449 So.2d 756, 762 (Miss.1984); *State v. Jones*, 296 N.C. 495, 251 S.E.2d

425, 427-29 (1979); *State v. Gilbert*, 273 S.C. 690, 258 S.E.2d 890, 894 (1979); *Hawes v. State*, 240 Ga. 327, 240 S.E.2d 833, 839 (1977); *People v. Morse*, 60 Cal.2d 631, 36 Cal.Rptr. 201, 211-212, 388 P.2d 33, 43-44 (1964); *State v. Mount*, 30 N.J. 195, 152 A.2d 343, 351-52 (1959); *People v. Johnson*, 284 N.Y. 182, 30 N.E.2d 465, 467 (1940). For example, the Louisiana Supreme Court ordered a new sentencing hearing in a 1982 capital case when, without objection, the prosecutor argued to the jury that the "buck" started with them and did not end there, and that "everything" will more than likely be reviewed by every appeals court in the United States. *State v. Willie*, 410 So.2d 1019, 1034-35 (La. 1982). But it does not necessarily follow from the circumstance that Louisiana law forbade the argument made by Sawyer's prosecutor when it was made, that the Supreme Court did not announce a "new" rule in *Caldwell*.

Sawyer's argument fails to deal with *Teague*'s explicit offer of *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986), as an example of a decision that created a "new rule." *Ford* held that the Eighth Amendment prohibits states from inflicting the penalty of death on an insane prisoner. Execution of the insane was prohibited at common law. Indeed, the *Ford* Court observed that "[t]he bar against executing a prisoner who has lost his sanity bears impressive historical credentials . . ." 477 U.S. at 406, 106 S.Ct. at 2600. Moreover, twenty-six states of the forty-one with a death penalty had "statutes explicitly requiring the suspension of the execution of a prisoner who meets the legal test for incompetence." *Id.* at 408, n. 2, 106 S.Ct. at 2601, n. 2. Sawyer's reliance upon *Caldwell*'s common law roots and its relationship to the rules

of several states, including Louisiana, cannot be squared with the Supreme Court's view that it created a new rule in *Ford v. Wainwright*.

[18] There was no federal jurisdiction over Sawyer's present claim until this type of error gained a constitutional footing. *Caldwell* was certainly new in its conclusion that such arguments violated the Eighth Amendment. See Mello, 30 B.C.L. Rev. at 305. Of course, when Sawyer's conviction became final, *Donnelly* would have authorized federal jurisdiction over a habeas petition attacking the sentence on due process grounds. Yet, as we have seen, Sawyer persuasively contends that *Caldwell* was more than a straightforward application of *Donnelly* to new facts. Our question is then whether these changes suffice to make *Caldwell* a new rule within the meaning of *Teague*.

The *Teague* court held that "a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government . . . [t]o put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Teague*, 109 S.Ct. at 1070 (emphasis in original). Accord, *Penry*, 109 S.Ct. at 2944. We have little difficulty in concluding that so measured, *Caldwell*'s greatly heightened intolerance of misleading jury argument is a new rule within the meaning of *Teague*. Its direct impact upon the finality of state convictions is illustrated by this case.

Sawyer, however, nonetheless contends that this heightened standard for review of prosecutorial argument does not create a new rule. He has two arguments. First, Sawyer says that Louisiana not only condemned *Caldwell*-type prosecutorial argu-

ment, but did so under an Eighth Amendment standard identical to the *Caldwell* standard. For this proposition, Sawyer cites a string of Louisiana cases explaining that Louisiana's death penalty procedures were designed to comply with the Supreme Court's Eighth Amendment decisions, see, e.g., *State v. Payton*, 361 So.2d 866, 870-73 (La.1978), *State v. Scannier*, 379 So.2d 1336, 1370 (La.1980), and *State v. Willie*, 410 So.2d 1019, 1032-33 (La.1982), and another string of Louisiana cases condemning *Caldwell*-type prosecutorial arguments, see, e.g., *State v. Berry*, 391 So.2d 406, 418 (La.1980), cert. denied, 451 U.S. 1010, 101 S.Ct. 2347, 68 L.Ed.2d 863 (1981); *Willie*, 410 So.2d at 1034-35, and *State v. Robinson*, 421 So.2d 229, 231-34 (La.1982).

Yet it is one thing to say that a state, inspired by earlier constitutional decisions, had anticipated *Caldwell* as a matter of state law, and a very different matter to say that the state had recognized a *Caldwell*-type rule as a constitutional restriction on its own power. In an effort to bring the Louisiana cases within the latter category, Sawyer relies heavily on the Louisiana Supreme Court's recent post-*Caldwell* decision in *State ex rel. Busby v. Butler*, 538 So.2d 164, 173 (La.1988). There, the Louisiana Court said it need not consider a *Caldwell* claim on collateral attack after rejecting a similar state law challenge on direct review, for *Caldwell* "did not change our previous case law." Again, however, this statement and the other remarks in *Busby* indicate only that the state law and *Caldwell* rules are coincident. The remarks do not show that Louisiana law condemned *Caldwell* argument because it regarded such argument as an Eighth Amendment violation. We therefore need not decide whether, if a rule is "new" as a matter of constitutional interpretation but not "new"

in state interpretations of the federal Constitution, it is nonetheless "new" for purposes of the *Teague* bar upon collateral federal challenges to state convictions.

Sawyer next contends that this Circuit in *Moore v. Blackburn*, 774 F.2d 97, 98 (5th Cir.1985), cert. denied, — U.S. —, 106 S.Ct. 2904, 90 L.Ed.2d 990 (1986), has already decided that *Caldwell* is not a new rule. In *Moore*, we held that even if the *Caldwell* standard were separable from the Louisiana state standard for assessing prosecutorial argument, petitioner Moore should have anticipated in an earlier habeas petition the possibility of a distinct constitutional standard. We therefore held that Moore's *Caldwell* argument was not "new" for purposes of the writ abuse doctrine, and stated that the doctrine would bar the argument. Sawyer's attempt to rely on *Moore* must fail, for the meaning of "newness" differs in writ abuse cases from its meaning in *Teague* cases. In writ abuse cases, the key question is whether a particular argument is being made by attorneys: the argument is not "new" if it is being made, and so should be known to attorneys. The Supreme Court makes clear, however that a rule is new for purposes of *Teague* if it has not been accepted at the time the petitioner's conviction became final. *Teague*, 109 S.Ct. at 1070. *Moore* thus cannot bear the freight Sawyer would put on it.

C

The *Teague* test allows two exceptions. Sawyer, however, cannot contend that the sentence imposed upon him was unlawful because the conduct for which he was charged is constitutionally privileged, or that he is among a class of persons protected against execution. He contends only

that the state's sentencing procedure was unconstitutionally administered. *Teague*'s first exception, dealing with substantive limitations upon the criminal law-making authority, therefore does not apply.

We turn, then, to the plurality's insistence in *Teague* that a new rule may be relied upon by a habeas petitioner if it both "requires the observance of those procedures that . . . are implicit in the concept of ordered liberty" and "procedures without which the likelihood of an accurate conviction is seriously diminished." Sawyer contends that we should not in his case apply the "accurate conviction" qualification to Harlan's proviso. First, Sawyer argues that the qualification is only a plurality view. The *Penry* opinions did not discuss the "fundamental to ordered liberty" proviso, or the "actual innocence" qualification to it. However, Justice White's joinder in Justice Scalia's dissent, and in Part II-A of Justice O'Connor's opinion (which references the *Teague* plurality's formulation of the exceptions), strongly suggests that Justice White has adopted the position of the *Teague* plurality. In any event, our short answer is that pending further direction from the Supreme Court, and in particular the full view of Justice White, we should follow the course set by the plurality as best we can.

[19] Second, Sawyer argues that confining use of new rules to those implicating factual innocence has no relevance to a jury's decision to impose a death and not a life sentence. We are not persuaded. A habeas petitioner may not escape this limitation on use of a new rule by confining his attack to the jury's decision to impose a death rather than life sentence. Rather, such a petitioner must show that the new rule insists on procedures without which

the correctness of the jury's decision to punish by death rather than by life imprisonment is seriously diminished.

We thus accept the plurality's formulation of the proviso, and turn to its application. Our task is made difficult by the newness of the amalgam of the second proviso as well as its uncertain precedential footing. Justice O'Connor's opinion for the plurality insisted that it is "unlikely that many such components of basic due process have yet to emerge." 109 S.Ct. at 1077. Justice O'Connor went on to say that these components are "best illustrated by recalling the classic grounds for the issuance of a writ of habeas corpus—that the proceeding was dominated by mob violence; that the prosecutor knowingly made use of perjured testimony; or that the conviction was based on a confession extorted from the defendant by brutal methods" (citations omitted). The new rule contended for in *Teague* was an extension to petit juries of the fair cross section requirement of a jury venire. The plurality opinion concluded that such a new rule "would not be a 'bedrock procedural element' that would be retroactively applied under the second exception...." *Id.* at 1077.

While the Court has made plain that it expects to encounter few new, discovered bedrock procedural rules, it is not clear how *Caldwell*, with its condemnation of a particular type of jury argument, fits into the *Teague* scheme. This difficulty stems in part from uncertainty about *Teague*'s standard for sorting the bedrock from the host of other rules calculated to enhance the efficiency and fairness of a trial. We can immediately put aside rules that only enhance as distinguished from rules essential to fundamental fairness. This first cut is informed by developed principles of incorporation doctrine that leave the states

free of all but the core assurances, variously expressed as rejecting "tail with the hide" and "jot-for-jot" incorporation. See e.g., *Duncan v. Louisiana*, 391 U.S. 145, 181, 88 S.Ct. 1444, 1465, 20 L.Ed.2d 491 (1968) (Harlan, J., dissenting). For example, the Fourteenth Amendment requires Louisiana to provide Sawyer a jury and a fundamentally fair trial. Louisiana has wide latitude in its choice of procedures for doing so and few procedures are so essential as to be required by the Fourteenth Amendment. This distinction is reflected in our willingness to find errors to be harmless and our refusal to grant relief absent a demonstration not only that the rule was violated but also that its violation rendered a trial fundamentally unfair.

Caldwell manifestly implicates two principles that would be fundamental in the sense required by *Teague*'s second proviso. The first is *Donnelly*'s restriction requiring that a proceeding not be "fundamentally unfair" to the defendant. The second is the more expansive regard for jury discretion suggested by *McGautha*, a regard trimmed back, as we have mentioned, by the Court's later interpretations of the Eighth Amendment. Were Sawyer seeking to rely on either of these principles as new rules, his argument would be compelling. Yet *Donnelly*'s principle is not new by comparison to Sawyer's conviction, and *McGautha*'s general themes do not constitute a rule at all. What Sawyer seeks to rely upon is *Caldwell*'s modification of *Donnelly* in light of the ideals discussed in *McGautha*. That modification is not itself so fundamental as to be "implicit in the concept of ordered liberty." After all, the only defendants who need to rely on *Caldwell* rather than *Donnelly* are those who must concede that the prosecutorial argument in their case was not so harmful as to

render their sentencing trial "fundamentally unfair."

A recent decision of the Supreme Court supplies additional guidance for our inquiry. In *Dugger v. Adams*, the Court decided whether Florida's procedural default rule barred Adams's *Caldwell* claim. To resolve that issue, the Court had to determine whether a "fundamental miscarriage of justice" would result if the procedural default rule were permitted to defeat Adams's *Caldwell* claim. The Court held that no such miscarriage of justice would arise.

In reaching its conclusion, the *Adams* Court wrote as follows:

The dissent "assumes *arguendo*" that a fundamental miscarriage of justice results whenever "there is a substantial claim that the constitutional violation undermined the accuracy of the sentencing decision." ... According to the dissent, since "the very essence of a *Caldwell* claim is that the accuracy of the sentencing determination has been unconstitutionally undermined," ... the standard for showing a fundamental miscarriage of justice is necessarily satisfied. We reject this overbroad view. Demonstrating that an error is by its nature the kind of error that might have affected the accuracy of a death sentence is far from demonstrating that an individual defendant probably is "actually innocent" of the sentence he or she received. The approach taken by the dissent would turn the case in which an error results in a fundamental miscarriage of justice, the "extraordinary case," ... into an all too ordinary one.

109 S.Ct. at 1217-18 & n. 6.

Adams, of course, does not directly control *Teague*'s application to a *Caldwell*

claim. *Adams* applies a "fundamental miscarriage of justice" standard to determine whether a *Caldwell* claim might fit within an exception to the procedural default rule. *Teague* applies an "implicit in the concept of ordered liberty" and "implicating factual innocence" standard to determine whether a *Caldwell* claim might fit within an exception to the doctrine barring habeas petitioners from relying on new rules. The verbal formulae are different, and their application thus might differ, too. Moreover, the *Adams* miscarriage standard requires scrutiny of the facts of a particular case, while the *Teague* ordered liberty standard looks to the character of the general rule asserted.

Nonetheless, we must take care not to exaggerate the substantive import of these semantic differences. Similar concerns underlie both the procedural default doctrine and the *Teague* doctrine prohibiting reliance upon new rules. Both doctrines recognize the importance of finality in criminal convictions. Both doctrines promote federal-state comity by requiring federal courts to defer to the integrity of state convictions. And both doctrines put a premium upon the obligation of defendants to raise all relevant arguments before their convictions become final. Indeed, in some respects *Teague* functions as a radical extension of the procedural default rule by forcing defendants to establish a new rule on direct appeal, rather than on collateral attack, if they wish to rely on such a rule. Because of the similarities between the two doctrines, it is difficult to see why a *Caldwell* violation should be sufficiently fundamental to require an exception to the "new rule" doctrine, but not so fundamental as to require an exception to the procedural default doctrine.

Adams is also important for another reason: given the particular facts of *Adams*'s own case, the Court's disposition of the case presupposes a judgment about the importance of *Caldwell* error to a sentencing determination. In *Adams*, as the Court noted, the trial judge "found an equal number of aggravating and mitigating circumstances." The Court made clear that there was no fundamental miscarriage of justice even though *Caldwell* error goes to the accuracy of the sentencing procedure, and even though the case was a close one. In short, the mere possibility of a close case did not make the alleged error's threat to accuracy sufficiently fundamental to warrant exemption from the procedural bar.

Sawyer's *Caldwell* claim runs into comparable problems when analyzed in light of the second *Teague* proviso. Sawyer can argue at most that there would be a possibility, absent the alleged *Caldwell* violation, of a different outcome to the jury's sentencing procedure. Yet, as we have already stated, the Court's *Teague* opinion makes quite clear that not every procedural rule affecting the accuracy of a trial will fit within the "ordered liberty" proviso. To hold otherwise would be to cling to "jot-for-jot" or "tail-with-the-hide" incorporation, and to make the "extraordinary case into the ordinary one." Instead, the examples listed by the *Teague* Court—trial by mob rule, use of perjured testimony, or the extraction of confessions through brutal torture—either so distort the judicial process as to leave one with the impression that there has been no judicial determination at all, or else skew the actual evidence crucial to the trier of fact's disposition of the case. Here the jury did have an opportunity, even if procedurally flawed, to contemplate and review the relevant evidence. Sawyer's *Caldwell* claim has neither the over-

whelming influence upon accuracy nor the intimate connection with factual innocence demanded by the second *Teague* proviso.

Our extended exposition of the nature of *Caldwell* error reinforces the inferences we draw from the Supreme Court's decision in *Adams*. *Caldwell* error does indeed implicate core aspects of the sentencing procedure. As such, it implicates both the integrity of that procedure and the accuracy of the determination in any particular case. Yet to say that accuracy is implicated is not to say that the defendant is necessarily prejudiced. In fact, *Caldwell*'s deference to the fundamental character of the jury's role manifests itself precisely in its refusal to require actual prejudice to the defendant. *Caldwell* views prosecutorial argument as a basis for reversal if, when viewed within the context of the whole, it had an effect upon the jury's perception of its role in the sentencing proceeding. It is, of course, unusual to presume the existence of reversible error, on the basis of the prosecutor's comments, absent any showing of prejudice. This presumption is an important one, and, we would hope, will contribute to the increased integrity and accuracy of criminal procedure in this sensitive area. But none of this makes *Caldwell* so fundamental, or so connected with factual innocence, as to fit within *Teague*'s second proviso.

VI

[20] Of course, if Sawyer were able to show actual prejudice, he would be able to proceed under the more general fundamental fairness standard of *Donnelly v. DeChristoforo*. Yet Sawyer has not contended that such prejudice exists here, and we,

after a thorough review of the record, can find none.

We have covered considerable ground about the content of the *Caldwell* rule. Yet, the dissent falls silent on this set of issues, perhaps because the posture of the case does not require that we apply *Caldwell*. It is then only on narrow, but crucial grounds, that our opinion is engaged, and to assist its focus we conclude with one observation in reply to the dissenting view.

Judicial tradition demands that new rules find their trace in older ones. This search is near the core of discipline that distinguishes judges from other decision makers. Judges excel at the task. Such artisans possess a very important tool—a gauge of generality. It is no surprise then that *Teague*'s effort to limit federal habeas by asking whether a rule is new invites those who resist the restriction to reach for their tool kit. At a sufficient level of abstraction there are no new rules. The judicial artisan can start by asserting that the old rule is that a trial must be fundamentally fair, that a defendant is entitled to procedural due process. Stated this generally there have been few if any new rules for the trial of criminal cases.

The dissent does precisely this, resting its assertions on little more than that the old rule is the prohibition of unfair jury argument. Its old law is unnarrowed by any definition of its reach and force such as whether it treats such state conduct as inherently destructive of required fairness or insists on demonstrated prejudice in a given case. Louisiana rejected Sawyer's claim and Sawyer has no federal habeas claim without *Caldwell*. Nonetheless, we are told that *Caldwell* was dictated by precedent, that it broke no new ground and that it imposed no new obligation on the

states. We are asked to believe that *Caldwell* simply applied well established constitutional principles. If to the uninitiated this is dissemblance, unhappily it is to the cognoscenti business as usual. By adroit use of the generality gauge our able dissenting colleagues can breathe superficial credibility into the fable that *Caldwell* broke no new ground, imposed no new obligation on the states and was dictated by precedent. With all deference, there is afoot here no more than a resistance to the principles of finality adopted by *Teague*. We should not play such sophistical games. The issue here is whether the federal judiciary will take hold of the open ended character of the habeas remedy it has created. We are persuaded that little or nothing is left of *Teague*'s promise if the dissent's view is accepted. We think that this artisan's destruction of so recent a decision by the Supreme Court should be rejected and we do so. Ultimately only *Teague*'s authors can tell us if they meant what they said or if they have changed their minds.

For these reasons, we find that *Teague* bars Sawyer from pursuing his *Caldwell* claim. We affirm the district court's decision denying Sawyer's petition for a writ of habeas corpus.

KING, Circuit Judge, with whom REAVLEY, POLITZ, JOHNSON, and WILLIAMS, Circuit Judges, join dissenting:

Sawyer has been found guilty of capital murder. He does not contest his guilt. The only issue before the en banc court is whether he is entitled to have a properly instructed jury determine that he should be executed by the State or spend the rest of his life in jail, without the benefit of proba-

tion or parole.¹ Whatever we decide, he will not be set free.

The majority has rejected the interpretation of *Caldwell v. Mississippi*² on which the State relied in urging that we deny Sawyer's petition for habeas relief. The majority concludes, however, that the State may execute Sawyer, regardless of the merits of his *Caldwell* claim, because *Caldwell* established a "new rule" in constitutional law and, under the Supreme Court's recent decision in *Teague v. Lane*,³ Sawyer may not receive the benefit of its application because his conviction became final before *Caldwell* was decided.

If, as the majority admits, "it is not clear how *Caldwell* ... fits into the *Teague* scheme" because of the "newness of the amalgam" of standards *Teague* set on "uncertain precedential footing," we do not see why it is incumbent on us to condemn Sawyer to die instead of ordering the State to put the life-or-death issue to a jury that is not only not misled but is fully informed of its responsibilities. In contrast to the majority's ambivalence, we harbor no doubt that Sawyer is entitled to the constitutional protections guaranteed by the eighth amendment: *Caldwell* did not establish a "new rule," and even if it did, *Teague* requires its retroactive application. We, therefore, respectfully dissent.

I.

Although the majority opinion contains a lengthy exegesis on the role of the jury and the nature of *Caldwell* error, it does not reach the merits of Sawyer's claim. We would find that on the facts of Sawyer's case, his sentence is invalid under *Cald-*

well. The prosecutor, in describing the jury's role, remarked:

The law provides that if you find one of these circumstances then *what you are doing as a juror, you yourself will not be sentencing Robert Sawyer to the electric chair. What you are saying to this Court, to the people of this Parish, to any appellate court, the Supreme Court of this State, the Supreme Court possibly of the United States, that you the people as a fact finding body from all the facts and evidence you have heard in relationship to this man's conduct are of the opinion that there are aggravating circumstances as defined by the statute, by the State Legislature that this is the type of crime that deserves that penalty. It is merely a recommendation so try as he may, if Mr. Weidner tells you that each and every one of you I hope you can live with your conscience and try and play upon your emotions, you cannot deny, it is a difficult decision. No one likes to make those [sic] type of decision but you have to realize if but for this man's actions, but for the type of life that he has decided to live, if of his own free choosing, I wouldn't be here presenting evidence and making argument to you. You wouldn't have to make the decision (emphasis supplied).*

The prosecutor went on to describe the brutal nature of the crime and, briefly, its impact on the victim and her mother. Then, once again turning to the function of the jury, the prosecutor stated:

There is really not a whole lot that can be said at this point in time that hasn't

1. See La.Rev.Stat. Ann. 14:30(C) (1980).

2. 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985).

3. — U.S. —, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989).

already been said and done. The decision is in your hands. *You are the people that are going to take the initial step and only the initial step and all you are saying to this court, to the people of this Parish, to this man, to all the Judges that are going to review this case after this day, is that you the people do not agree and will not tolerate an individual to commit such a heinous and atrocious crime to degrade such a fellow human being without the authority and the impact, the full authority and impact of the law of Louisiana. All you are saying is that this man from his actions could be prosecuted to the fullest extent of the law. No more and no less* (emphasis supplied).

Finally, after arguing that a death penalty would be justified in this case, the prosecutor noted:

It's all your doing. Don't feel otherwise. Don't feel like you are the one, because it is very easy for defense lawyers to try and make each and every one of you feel like you are pulling the switch. That is not so. It is not so and *if you are wrong in your decision believe me, believe me there will be others who will be behind you to either agree with you or to say you are wrong so I ask that you do have the courage of your convictions (emphasis supplied).*

The prosecutor's arguments in Sawyer's case fall squarely within *Caldwell*'s prohibition of misleading and inaccurate arguments regarding appellate review that seek to diminish the jury's sense of its responsibility in capital sentencing. The trial court

did not correct these statements, and because we cannot say that these comments had no effect on the jury's decision, we would vacate Sawyer's sentence and grant him a new sentencing hearing.⁴

II.

Whether Sawyer may receive the benefit of the constitutional protection enunciated in *Caldwell* depends, however, on the threshold determination that *Caldwell* established a "new rule." Conceding that "[i]t is ... often difficult to determine when a case announces a new rule," the plurality in *Teague* nevertheless offered the following explanation: "In general ... a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government.... To put it differently, a case announces a new rule if the result is not dictated by precedent existing at the time the defendant's conviction became final."⁵

The plurality recognized that constitutional rules will fall along a "spectrum"—from those that fit neatly within the rubric of settled law to those that constitute a clear break from prior precedent—but provided little additional guidance for determining at which point a rule is not "dictated" by precedent and, therefore, "new" for retroactivity purposes.⁶

In *Penry v. Lynaugh*,⁷ however, the Court began to elaborate the meaning of the term "new rule." The Court held that although it had previously found the Texas

4. See *Caldwell*, 472 U.S. at 341, 105 S.Ct. at 2646.

5. *Id.*, — U.S. at —, 109 S.Ct. at 1070 (O'Connor, J., plurality opinion) (emphasis in original) (citations omitted).

6. See *ibid.*

7. — U.S. —, 109 S.Ct. 2934, — L.Ed.2d — (1989).

sentencing scheme facially valid,⁸ the scheme, as applied to Penry, unconstitutionally limited the jury's ability to consider certain, relevant mitigating evidence.⁹ The Court held that this determination did not constitute a "new rule" given the requirement that capital sentencing procedures permit the sentencing jury to consider and give effect to all relevant mitigating evidence.¹⁰

The Court reasoned that a rule is not "new" for purposes of retroactivity analysis when it "fulfill[s] the assurance" upon which a previous case "was based," or merely "interpret[s] broadly" that previous case.¹¹ The Court thus made clear that its "dictated by precedent" language was not intended to categorize as "new" every rule that does not fit precisely within the pattern of a previously decided case. Rather, the Court recognized that the process of constitutional interpretation routinely requires courts to articulate extant law and apply established principles of law to different facts and in different contexts. Rules that are the product of this gradual process of refining and developing doctrine are not "new." To define "new" rules more broadly would depart significantly from the traditional understanding of con-

stitutional jurisprudence as an evolving body of principles rather than jarring series of revolutionary pronouncements.¹²

This differentiation between elaborating and applying established principles, on the one hand, and announcing new rules that are dissonant with prior understandings of the law, on the other hand, derives directly from Justice Harlan's view of retroactivity that the Court adopted in *Teague* and applied in *Penry*. Justice Harlan observed "that many, though not all, of this Court's constitutional decisions are grounded upon fundamental principles . . . whose meanings are altered slowly and subtly as generation succeeds generation."¹³ He reasoned that such rules are not "new" and should be given retroactive application in habeas proceedings because "one could never say with any assurance that this Court would have ruled differently at the time the petitioner's conviction became final."¹⁴

Caldwell held that a prosecutor may not "le[a]d" a jury to "believe" that it is not "responsib[le] for determining the appropriateness of [a] defendant's death."¹⁵ The Court based this rule upon its belief

8. See *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976).

9. *Penry*, — U.S. at —, 109 S.Ct. at 2951.

10. *Id.* at —, 109 S.Ct. at 2943-47; see *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

11. *Penry*, — U.S. at —, 109 S.Ct. at 2945.

12. See *Yates v. Aiken*, 484 U.S. 211, —, 108 S.Ct. 534, 538, 98 L.Ed.2d 546 (1988); *Truesdale v. Aiken*, 480 U.S. 527, 107 S.Ct. 1394, 94 L.Ed.2d 539 (1987); *Griffith v. Kentucky*, 479 U.S. 314, 323, 107 S.Ct. 708, 714, 93 L.Ed.2d 649 (1987); *Allen v. Hardy*, 478 U.S. 255, 258, 106 S.Ct. 2878, 2880, 92 L.Ed.2d 199 (1986);

Shea v. Louisiana, 470 U.S. 51, 57, 105 S.Ct. 1065, 1068, 84 L.Ed.2d 38 (1985); *United States v. Johnson*, 457 U.S. 537, 549-50, 102 S.Ct. 2579, 2586-87, 73 L.Ed.2d 202 (1982); *Solem v. Stumes*, 465 U.S. 638, 662, 104 S.Ct. 1338, 1352, 79 L.Ed.2d 579 (1984) (Stevens, J., dissenting); see also Schwartz, *Retroactivity, Reliability, and Due Process: A Reply to Professor Mishkin*, 33 U.Chi.L.R. 719, 749-54 (1966).

13. *Desist v. United States*, 394 U.S. 244, 263, 89 S.Ct. 1030, 1041, 22 L.Ed.2d 248 (1969) (Harlan, J., dissenting).

14. *Id.* at 264, 89 S.Ct. at 1041.

15. *Caldwell*, 472 U.S. at 329, 105 S.Ct. at 2639.

that such prosecutorial misconduct "was fundamentally incompatible with the Eighth Amendment's heightened 'need for reliability'" in capital sentencing, and that such conduct, "if left uncorrected, might so affect the fundamental fairness of the sentencing proceeding as to violate the Eighth Amendment."¹⁶ Arguments that seek to diminish the jury's sense of responsibility, the Court explained, undermine core eighth amendment values:

The "delegation" of sentencing responsibility that the prosecutor here encouraged . . . would deprive [the defendant] of . . . [the] right to a fair determination of the appropriateness of his death . . . for an appellate court, unlike a capital sentencing jury, is wholly ill-suited to evaluate the appropriateness of death in the first instance. Whatever intangibles a jury might consider in its sentencing determination, few can be gleaned from an appellate record. This inability to confront and examine the individuality of the defendant would be particularly devastating to any argument for consideration of what this Court has termed

"(those) compassionate or mitigating factors stemming from the diverse frailties of humankind."¹⁷

Far from articulating an unanticipated principle of law or breaking with a past understanding of the law, *Caldwell* interpreted and followed directly the Court's own eighth amendment jurisprudence. The *Caldwell* Court fulfilled the assurance enunciated in *Furman v. Georgia*¹⁸ and *Gregg v. Georgia*¹⁹ that capital punishment not be administered "wantonly" or "freakishly" or in an "arbitrary and capricious manner;"²⁰ it applied the "need for reliability in the determination that death is the appropriate punishment in a specific case," assured in *Woodson v. North Carolina*,²¹ *Lockett v. Ohio*,²² and *Eddings v. Oklahoma*,²³ to a situation in which that reliability was compromised; it fulfilled the promise of *Woodson*, *Lockett*, and *Eddings* that a defendant be sentenced to death only after an individualized determination of his moral culpability;²⁴ and it applied the need first articulated in *McGautha v. California*²⁵ that jurors be "confronted with the truly awesome responsibility of decreeing

16. *Id.* at 340, 105 S.Ct. at 2645 (footnote omitted) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976) (Stewart, J., plurality opinion)); see *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 1871, 40 L.Ed.2d 431 (1974).

17. *Caldwell*, 472 U.S. at 330, 105 S.Ct. at 2640 (quoting *Woodson*, 428 U.S. at 304, 96 S.Ct. at 2991 (Stewart, J., plurality opinion)).

18. 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

19. 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

20. *Gregg*, 428 U.S. at 188, 96 S.Ct. at 2932 (Stewart, J., plurality opinion) (citing *Furman*, 408 U.S. at 310, 92 S.Ct. at 2763 (Stewart, J., concurring)).

21. 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976) (Stewart, J., plurality opinion).

22. 438 U.S. 586, 604, 98 S.Ct. 2954, 2964-65, 57 L.Ed.2d 973 (1978) (Burger, C.J., plurality opinion).

23. 455 U.S. 104, 113-14, 102 S.Ct. 869, 876-77, 71 L.Ed.2d 1 (1982).

24. See *Woodson*, 428 U.S. at 305, 96 S.Ct. at 2991 (Stewart, J., plurality opinion); *Lockett*, 438 U.S. at 601-05, 98 S.Ct. at 2963-65 (Burger, C.J., plurality opinion); *Eddings*, 455 U.S. at 112-15, 102 S.Ct. at 875-77; see also *Stanford v. Kentucky*, — U.S. —, 109 S.Ct. 2969, — L.Ed.2d — (1989) (O'Connor, J., concurring); *South Carolina v. Gathers*, — U.S. —, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989).

25. 402 U.S. 183, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1971).

death for a fellow human"²⁶ to a case in which the prosecutor specifically instructed the jury that it had no such responsibility. With due respect to the three dissenters in *Caldwell*, it is difficult to imagine the Court reaching any other conclusion given these precedents.

There was, moreover, no precedent inconsistent or dissonant with *Caldwell* at the time it was decided. While the Court, in *Donnelly v. DeChristoforo*,²⁷ had imposed a more stringent due-process test for claims of improper argument made at the guilt/innocence phase of trial, this analysis applied neither to improper argument at sentencing proceedings nor to argument implicating "specific guarantees of the Bill of Rights."²⁸ The *Donnelly* Court thus left open the possibility that improper arguments at sentencing not violative of the Due Process Clause may be held to contravene the eighth amendment's requirements.

Similarly, in *California v. Ramos*,²⁹ the Court posited its approval of jury instructions containing information regarding postconviction procedures on the fact that the information was both relevant and accurate.³⁰ While the Court in *Ramos* did not address whether a prosecutor violates the Constitution by presenting irrelevant and misleading information concerning post-conviction proceedings, its emphasis on the nature of the instruction forecast that such information would be found to undermine the reliability of the sentencing

process by injecting into it an arbitrary factor in violation of the eighth amendment.³¹

If, as the Court in *Penry* instructed, we should consider a case "dictated by precedent" and not "new" for retroactivity purposes when it "fulfill[s] the assurance[s]" of or "interpret[s] broadly" principles articulated in a previous case,³² it is difficult to see how the majority may conclude that *Caldwell* announced a "new rule." *Caldwell* fulfilled the assurance of and interpreted faithfully the settled principle in eighth amendment jurisprudence that a verdict of death must rest upon the reliable determination of a jury accurately informed of its "awesome responsibility;" the same line of eighth amendment cases that compelled the result in *Penry* thus compelled the result in *Caldwell*.

The majority contends that the foregoing analysis unduly restricts the scope of *Teague*. Its criticism of our interpretive method is misdirected, however, for the majority's dispute is not, in reality, with our interpretation of *Teague*, but with *Penry*'s elaboration of the "new rule" standard set forth in *Teague*. Indeed, the majority's criticism of our analysis echoes precisely Justice Scalia's dissent in *Penry*.³³ In admonishing us to wait for "*Teague*'s authors [to] ... tell us if they meant what they said," the majority ignores the fact that *Teague*'s authors have already spoken in *Penry* and have effectively rejected any

26. *Id.* at 208, 91 S.Ct. at 1467.

27. 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974).

28. *Id.* at 643, 94 S.Ct. at 1871.

29. 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983).

30. *Id.* at 1004, 1009, 1012, 103 S.Ct. at 3455, 3457, 3459.

31. See *Caldwell*, 472 U.S. at 342-43, 105 S.Ct. at 2646-47 (O'Connor, J., concurring in part and concurring in the judgment) (citing *Ramos*, 463 U.S. at 999, 1010, 103 S.Ct. at 3451, 3458).

32. *Penry*, — U.S. at —, 109 S.Ct. at 2944.

33. *Id.* at —, 109 S.Ct. at 2963.

definition of a "new rule" that would sweep broadly enough to encompass *Caldwell*.

If anything, Sawyer's claim that *Caldwell* followed eighth amendment jurisprudence consistently is stronger than *Penry*'s, for no precedent like *Jurek* existed in the *Caldwell* context to lead state courts to reach a conclusion different from the Supreme Court's holding in *Caldwell*. Indeed, the Court in *Caldwell* observed that after *Furman*, several state supreme courts—including Louisiana's—had anticipated *Caldwell* and found that *Caldwell*-type errors undermined the validity of a death sentence;³⁴ it noted that some state courts had prohibited such arguments in both capital and noncapital cases even before *Furman*.³⁵

At least five years before the Supreme Court decided *Caldwell*, the Louisiana Supreme Court held that arguments that diluted the jury's sense of responsibility for imposing a capital sentence injected an arbitrary factor into the jury's decision and invalidated the sentence. In 1980, when denying an application for rehearing in *State v. Berry*,³⁶ the Louisiana Supreme Court recognized

[a]ny prosecutor who refers to appellate review of the death sentence treads dangerously in the area of reversible error. If the reference conveys the message

that the jurors' awesome responsibility is lessened by the fact that their decision is not the final one, ... then the defendant has not had a fair trial in the sentencing phase, and the penalty should be vacated.... The issue should be determined in each individual case by viewing such a reference to appellate review in the context in which the remark was made.³⁷

In 1982, in *State v. Willie*,³⁸ the State Supreme Court vacated a death sentence and remanded for a new sentencing hearing when the prosecutor referred to appellate review and told the jury that "the buck really don't [sic] stop with you. The buck starts with you.... [W]hat I'm asking you to do is start the buck rolling."³⁹ The court quoted *Berry*, and added:

This type of argument may not be made in a criminal case in which the punishment may be capital. Jurors should approach the task of finding facts and exercising discretion as to choice of penalty with appreciation that their duties are serious and that they are accountable for their decisions, not with the feeling that they are making mere tentative determinations which the courts can correct. An argument improperly diminishes the jury's duty and responsibility if it implies that a reviewing court can substitute its judgment as to choice of punishment or that the decision of whether the sentence

of rehearing); *State ex rel. Williams v. Blackburn*, 396 So.2d 1249, 1250 (La.1981) (Dennis, J., dissenting from denial of stay); *id.* at 1250 (Calogero, J., concurring in denial of the stay); *State v. Monroe*, 397 So.2d 1258, 1270 (La.1981), cert. denied, 463 U.S. 1229, 103 S.Ct. 3571, 77 L.Ed.2d 1411 (1983).

38. 410 So.2d 1019 (La.1982), cert. denied, 465 U.S. 1051, 104 S.Ct. 1327, 79 L.Ed.2d 723 (1984).

39. *Id.* at 1034.

34. *Caldwell*, 472 U.S. at 333-34 & n. 4, 105 S.Ct. at 2642 & n. 4 (citing cases).

35. *Id.* at 334 & n. 5, 105 S.Ct. at 2642 & n. 5 (citing cases).

36. 391 So.2d 406 (La.1980) (denial of application for rehearing), cert. denied, 451 U.S. 1010, 101 S.Ct. 2347, 68 L.Ed.2d 863 (1981).

37. *Berry*, 391 So.2d at 418 (emphasis in original) (portions of text omitted); see *id.* at 419-21 (Calogero, J., dissenting from denial

of death is appropriate is not entirely the jury's responsibility.⁴⁰

In *State v. Robinson*,⁴¹ also in 1982, the State Supreme Court vacated a death sentence and remanded for a new sentencing hearing because the prosecutor referred repeatedly to the jury's sentence as a "recommendation" that did not have a "strong possibility" of "get[ting] through all of that [appellate] review."⁴² Citing *Berry* and *Willie*, the court anticipated the "no effect" test required by the eighth amendment, stating:

The closing argument requires that the death sentence be set aside, because this court cannot determine that misleading and improper remarks of this magnitude did not influence the jury's recommendation.... [W]e cannot say that the jury's sentencing discretion was unaffected by the prosecutor's repeated and often misleading references to the largely irrelevant consideration of appellate review of death sentences.⁴³

As the Louisiana Supreme Court observed, *Caldwell* neither imposed a new obligation on prosecutors or courts nor broke new ground in Louisiana.⁴⁴ Before the Supreme Court decided *Caldwell*, Louisiana had already prohibited *Caldwell* argument and required reversal of sentences when it found such error. Moreover, in finding that *Caldwell* argument injected an arbitrary factor into the sentencing process, the Louisiana courts relied on the same eighth amendment principles that

compelled the Supreme Court's decision in *Caldwell*. In *State v. Sonnier*,⁴⁵ the Louisiana Supreme Court stated that under Louisiana law, the court "is charged with the responsibility of reviewing the jury's recommendation to determine whether the sentence was influenced by passion, prejudice or any arbitrary factor."⁴⁶ The court described how Louisiana modelled its provision for independent appellate review of death sentences on the Georgia procedure sanctioned in *Gregg v. Georgia*, and cited approvingly the Georgia Supreme Court's reversal of a death sentence when it found that "an unobjected to argument by a [prosecutor] may have influenced the jury to impose a more severe sentence than unbiased judgment would have given."⁴⁷ In *Willie*, the court again adverted to *Gregg*'s requirement that a sentencer's discretion be channelled to avoid arbitrary and capricious imposition of the death penalty, and held that the prosecutor's improper argument regarding appellate review "lessened" the jurors' appreciation of their "awesome responsibility" and "created a reasonable possibility that the death sentence was imposed under the influence of passion, prejudice or arbitrary factors."⁴⁸ Echoing *McGautha*, the Louisiana Supreme Court thus anticipated almost exactly Justice O'Connor's conclusion in *Caldwell* that such arguments "creat[e] an unacceptable risk that 'the death penalty [may have been] meted out arbitrarily or capriciously' ... or through 'whim ... or

40. *Id.* at 1035; see *State v. Clark*, 492 So.2d 862, 870-71 (La.1986).

41. 421 So.2d 229 (La.1982).

42. *Id.* at 231-33.

43. *Id.* at 233-34 (portions of text omitted).

44. See *State ex rel. Busby v. Butler*, 538 So.2d 164, 173 (La.1988).

45. 379 So.2d 1336 (La.1979).

46. *Id.* at 1371.

47. *Id.* at 1370-71 & n. 4.

48. *Willie*, 410 So.2d at 1032, 1034.

mistake."⁴⁹

The majority concedes that numerous states, including Louisiana, forecast *Caldwell* by prohibiting the arguments that the *Caldwell* Court ultimately barred, but concludes that because states' *Caldwell* precursors did not impose an independent constitutional constraint on state power, they are irrelevant to *Teague*'s analysis. That the state courts adopted these rules before *Caldwell* to conform state law to perceived eighth amendment requirements, rather than conforming to an independent federal constitutional constraint articulated by the Supreme Court, is a distinction without a difference for the purpose of determining whether *Caldwell* announced a "new rule." In either case, the state courts based their interpretations on the eighth amendment, and their widespread anticipation of *Caldwell* strongly suggests that the Supreme Court's subsequent decision in that case maintained a continuity with and fulfilled clearly discernible principles in eighth amendment jurisprudence.

In *Dugger v. Adams*,⁵⁰ the Supreme Court found these state laws sufficiently established to conclude that the legal basis for raising a *Caldwell*-type claim prior to *Caldwell* was "reasonably available to counsel," and that *Caldwell* was, therefore, of such vintage as to be subject to the

procedural-bar rule.⁵¹ In *Moore v. Blackburn*,⁵² we considered a writ application based on *Caldwell* barred by the abuse-of-writ doctrine for the same reason. If both the Supreme Court and this court have considered, on the basis of state laws anticipating *Caldwell*, a *Caldwell*-type claim sufficiently established to negate cause for failing to raise it years before *Caldwell*, how may we now ignore these state laws and conclude that *Caldwell* is novel?

Contrary to the majority's assertion, the *Teague* plurality's citation of *Ford v. Wainwright*⁵³ as an example of a "new rule" does not establish that state rules are irrelevant to determining whether a rule is "new."⁵⁴ In *Ford*, the Court looked to state law for "objective evidence of contemporary values"⁵⁵ and noted that 26 states had enacted statutes prohibiting the execution of insane persons while other states adhered to the common law principle prohibiting such executions.⁵⁶ Although the *Teague* plurality did not explain why *Ford* should be considered a "new rule," the Court's discussion in *Penry* suggests that any substantive eighth amendment rule that "prohibits imposing the death penalty on a certain class of defendants because of their status or because of the nature of their offense" will be "new" because of its sweeping and categorical nature,⁵⁷ even

49. *Caldwell*, 472 U.S. at 343, 105 S.Ct. at 2647 (O'Connor, J., concurring in part and concurring in the judgment) (quoting *Ramos*, 463 U.S. at 999, 103 S.Ct. at 3451, and *Eddings*, 455 U.S. at 118, 102 S.Ct. at 879).

50. — U.S. —, 109 S.Ct. 1211, 103 L.Ed.2d 435 (1989).

51. *Id.* at —, 109 S.Ct. at 1215-17.

52. 774 F.2d 97 (5th Cir.1985), cert. denied, 476 U.S. 1176, 106 S.Ct. 2904, 90 L.Ed.2d 990 (1986).

53. 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986).

54. See *Teague*, — U.S. at —, 109 S.Ct. at 1070.

55. *Ford*, 477 U.S. at 406, 106 S.Ct. at 2600.

56. *Id.* at 408-09 & n. 2, 106 S.Ct. at 1071 & n. 2.

57. *Penry*, — U.S. at —, 109 S.Ct. at 2951 (citations omitted). Such a rule would, however, necessarily fall within the first exception to *Teague* and would be applied retroactively. See *ibid.*

though such a rule may be premised on a finding that contemporary values, manifested through legislative enactments, already condemn such punishment.⁵⁸ The fact that a rule is inherently ground-breaking insofar as it announces a new, categorical rule of substantive eighth amendment law thus appears to outweigh the fact that the rule derives from these indicia of community consensus.

The *Teague* plurality's citation of *Ford* cannot, therefore, be construed as a broad holding regarding the proper role of state law in determining whether a rule is "new." At most, *Teague*'s citation of *Ford* indicates that the existence of state common law and statutes embodying principles later incorporated into eighth amendment law does not preclude a finding that the rule is nevertheless "new." It does not command us to ignore state law and, in particular, it does not indicate that state court interpretations of the federal Constitution are irrelevant to determining whether a rule is "new" under *Teague*.

Indeed, the majority's refusal to address the import of a state's interpretation of the federal Constitution misconstrues the basis of *Teague*'s retroactivity principles. The plurality opinion in *Teague* anchored its retroactivity analysis, the majority recognizes, in the principles of federalism and finality; it sought to mitigate the uncertain effect of new and unanticipated obligations on final state court judgments.⁵⁹ The ma-

jority ignores, however, a basic precept of federalism that animated the *Teague* plurality: state courts, no less than federal courts, may meaningfully interpret the federal Constitution. "It is intolerable," Justice Harlan asserted, "that [the Supreme Court] take to [itself] the sole ability to speak to . . . issues of federal constitutional law;" the decision of an "inferior" court, "cognizant of the Federal Constitution and duty bound to apply it," should not be deemed "forever erroneous because years later [the Supreme] Court took a different view of the relevant constitutional command."⁶⁰ The majority's failure to acknowledge and give effect to Louisiana's prohibition of *Caldwell*-type error prior to *Caldwell* minimizes the role of state courts in our federal constitutional framework and devalues the importance of the dialogue by which state and federal courts articulate evolving federal constitutional norms.⁶¹

Sawyer did not raise his *Caldwell* claim on direct review, and, on collateral review, the Louisiana courts summarily rejected the argument on its merits. Although our conclusion on the merits of Sawyer's claim differs from that reached by the Louisiana courts on collateral review, we rely on the same constitutional principles that the state courts considered, not on some "new" constitutional rule unanticipated by the Louisiana Supreme Court. An advocate of even the narrowest view of the appropriate role

58. *Ibid.*; see *Stanford v. Kentucky*, — U.S. —, 109 S.Ct. 2969, 2975, — L.Ed.2d —, — (1989); *Thompson v. Oklahoma*, 487 U.S. —, 108 S.Ct. 2687, 2691, 101 L.Ed.2d 702 (1988); *Enmund v. Florida*, 458 U.S. 782, 788-96, 102 S.Ct. 3368, 3371-76, 73 L.Ed.2d 1140 (1982); *Coker v. Georgia*, 433 U.S. 584, 593-97, 97 S.Ct. 2861, 2866-68, 53 L.Ed.2d 982 (1977).

59. *Teague*, — U.S. at —, 109 S.Ct. at 1070-75 (O'Connor J., plurality opinion).

60. *Mackey v. United States*, 401 U.S. 667, 680, 689-90, 91 S.Ct. 1160, 1174, 1178, 28 L.Ed.2d 404 (1971) (Harlan, J., concurring in the judgment).

61. See Cover and Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 Yale L.J. 1035 (1977).

of collateral review could not maintain that principles of federalism and finality preclude habeas relief whenever a federal court, applying the same constitutional principles as the state court, reaches a different conclusion on the merits of a petitioner's claim. This minimal "backstop" function of collateral review to which the majority refers remained untouched by *Teague*.

We are aware that the Court's decision in *Penry* implies that the "new rule" analysis is properly focused on one state when the proposed rule is directed at the procedure of a particular state, but may be broader when the proposed rule would apply to all states.⁶² We, therefore, do not suggest that Louisiana's anticipation of *Caldwell* is dispositive⁶³ of whether *Caldwell* was a new rule, for *Caldwell* error is not restricted to Louisiana's sentencing procedure. At a minimum, however, the adoption of *Caldwell*-type rules by numerous states, including Louisiana, prior to *Caldwell* reveals the degree to which the Court's eighth amendment jurisprudence compelled the result reached in *Caldwell*.

III.

Even if *Caldwell* announced a new rule, it nevertheless should be applied to cases on collateral review because it falls within the exception provided by *Teague* for new rules requiring the observance of "those

procedures that . . . are implicit in the concept of ordered liberty," that "implicate the fundamental fairness of the trial," and, "without which the likelihood of an accurate conviction is seriously diminished."⁶⁴

The plurality in *Teague* diverged from Justice Harlan's approach to retroactivity by adding an "accuracy" qualification to the "fundamental fairness" exception, implying that only those rules touching on factual innocence would fall within it.⁶⁵ While Justice Harlan had subscribed to this view in his dissent in *Desist*,⁶⁶ he subsequently rejected it in *Mackey*, acknowledging that "it is not a principal purpose of the writ to inquire whether a criminal convict did in fact commit the deed alleged."⁶⁷ The majority admits that the *Teague* plurality's modification of Justice Harlan's second exception does not command a majority of the Court, and although a solid majority of the Court employed *Teague*'s retroactivity analysis in *Penry*, *Penry* did not address the *Teague* plurality's gloss of the fundamental fairness exception.⁶⁸

The Court's unanimous recognition in *Penry* that *Teague*'s first exception encompasses a distinct eighth amendment component⁶⁹ suggests that the Court would find a parallel component in *Teague*'s second exception, and exempt from *Teague*'s nonretroactivity rule those capital sentencing procedures that ensure the "accuracy" of the sentencer's determina-

62. See *Penry*, — U.S. at —, —, 109 S.Ct. at 2943-47, 2951.

63. See *Teague*, 109 S.Ct. at 1070 (citing *Ford*, 477 U.S. at 410, 106 S.Ct. at 2602).

64. *Teague*, — U.S. at —, 109 S.Ct. at 1075-77 (O'Connor, J., plurality opinion) (quoting *Mackey*, 401 U.S. at 693, 91 S.Ct. at 1180 (Harlan, J., concurring in the judgment) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937))).

65. See *Teague*, — U.S. at —, 109 S.Ct. at 1080 (Stevens, J., concurring in part and concurring in the judgment).

66. See *Desist*, 394 U.S. at 262, 89 S.Ct. at 1041 (Harlan, J., dissenting).

67. *Mackey*, 401 U.S. at 694, 91 S.Ct. at 1181 (Harlan, J., concurring in the judgment).

68. See *Penry*, — U.S. at —, —, 109 S.Ct. at 2943, 2953.

69. *Ibid.*

tion. The plurality in *Teague* acknowledged that "a criminal judgment necessarily includes the sentence imposed."⁷⁰ Both the plurality and dissent in *Teague* would, therefore, agree that *Teague*'s exemption of new rules that ensure the accuracy of the determination of the defendant's guilt or innocence includes new rules that ensure the accuracy of the sentencer's determination that a particular defendant deserves the death penalty.⁷¹

The rule *Caldwell* announced, based on the "heightened 'need for reliability'" in capital sentencing,⁷² satisfies *Teague*'s second exception: *Caldwell* error undermines the eighth amendment's requirement that responsible jurors produce individualized, reliable verdicts, and thus seriously diminishes the likelihood of an accurate sentence. As Justice O'Connor emphasized in her concurrence in *Caldwell*: "[T]he prosecutor's misleading emphasis on appellate review misinformed the jury, ... creating an unacceptable risk that 'the death penalty [may have been] meted out arbitrarily and capriciously' ... or through 'whim or mistake.'"⁷³ For the majority to ignore the effect of *Caldwell* error on the reliability and accuracy of the sentence seriously misapprehends the nature of a *Caldwell* violation and the reasons behind the Court's decision to prohibit it.

To justify its conclusion that *Caldwell* does not satisfy *Teague*'s second excep-

tion, the majority relies primarily on *Dugger v. Adams*,⁷⁴ in which the Court held that refusing to consider a petitioner's procedurally-barred *Caldwell* claim would not result in a "fundamental miscarriage of justice."⁷⁵ Acknowledging that *Adams* scrutinized "the facts of a particular case, while the *Teague*-[ordered] liberty standard looks to the character of the general rule asserted," the majority nonetheless dismisses this distinction as more semantic than substantive.

Whether or not the principles underlying the procedural default and retroactivity doctrines are similar, there is a substantial difference between denying a particular petitioner the benefit of a rule based on the unique facts of his case, and holding that no petitioner, whatever his situation, may benefit from retroactive application of the rule to his case. The Court recognized this distinction in *Adams*, stating that "[d]emonstrating that an error is by its nature the kind of error that might have affected the accuracy of a death sentence is far from demonstrating that an individual defendant probably is 'actually innocent' of the sentence he or she received."⁷⁶ Under *Teague*, we must address the nature of *Caldwell* error, not the specific facts of Sawyer's case.

The majority conflates the individual and the categorical in order to obscure the ulti-

70. *Teague*, — U.S. at — n. 3, 109 S.Ct. at 1077 n. 3 (O'Connor, J., plurality opinion).

71. See *ibid.*; *id.* at — n. 5, 109 S.Ct. at 1089 n. 5 (Brennan, J., dissenting); cf. *Adams*, — U.S. at —, 109 S.Ct. at 1217-18 n. 6; *id.* at — n. 4, 109 S.Ct. at 1219 n. 4 (Blackmun, J., dissenting); *Ramos*, 463 U.S. at 1007-09, 103 S.Ct. at 3457.

72. *Caldwell*, 472 U.S. at 340, 105 S.Ct. at 2645 (quoting *Woodson*, 428 U.S. at 305, 96 S.Ct. at 2991 (Stewart, J., plurality opinion)).

73. *Caldwell*, 472 U.S. at 343, 105 S.Ct. at 2647 (O'Connor, J., concurring in part and concurring in the judgment) (quoting *Ramos*, 463 U.S. at 999, 103 S.Ct. at 3451 and *Eddings*, 455 U.S. at 119, 102 S.Ct. at 879).

74. — U.S. —, 109 S.Ct. 1211, 103 L.Ed.2d 435 (1989).

75. *Id.* at — n. 6, 109 S.Ct. at 1217-18 n. 6.

76. *Ibid.*

mate import of its holding—that the eighth amendment values *Caldwell* articulated constitute an unwarranted innovation in eighth amendment jurisprudence and are insignificant in the pantheon of values present in criminal procedure. *Caldwell* is worthy of higher esteem, for the Supreme Court found *Caldwell* error so destructive of the fundamental right of a defendant assured by the eighth amendment to a reliable and accurate sentence that it presumed the error to be prejudicial unless the state demonstrated otherwise.⁷⁷ Not all errors in the capital sentencing context are so critical. For example, a death sentence based on an aggravating factor invalid under state law, but supported by evidence properly before the sentencer, does not sufficiently implicate the accuracy of the sentencing process to warrant a presumption of prejudice.⁷⁸ Prejudice is assumed, however, when the sentencer has not been allowed to consider or give effect to relevant mitigating evidence,⁷⁹ when an aggravating factor is premised on incorrect or invalid evidence,⁸⁰ or when the jury's sense of responsibility has been undermined.⁸¹

IV.

The majority acknowledges that the death penalty "is different from all other

[punishments] in many respects." Yet, by denying that *Caldwell* interpreted and applied consistently the Court's eighth amendment jurisprudence to new facts, and by refusing to accord the heightened need for reliability in capital sentencing a role in *Teague*'s fundamental fairness exception, the majority eviscerates the procedural protections on which the constitutionality of this ultimate and irreversible penalty is premised. The majority has, in effect, given finality concerns greatest force in the area where the eighth amendment requires that we be most wary. We cannot agree that a state's interest in the finality of a judgment of death outweighs a defendant's right that a sentencing jury, accurately informed of its role and responsibility, determine his moral culpability. Society takes little delight in the grim, but sometimes necessary, execution of a criminal defendant; its investment is in the informed, deliberative process by which the state's taking of a life is made legitimate.

It is indeed ironic that the majority invokes *Teague*, undoubtedly a new rule,⁸² to prevent us from applying *Caldwell*, which is at most an extension of settled doctrine. If any case should be considered as having established a new rule not retroactively

77. *Caldwell*, 472 U.S. at 341, 105 S.Ct. at 2646.

78. See *Barclay v. Florida*, 463 U.S. 939, 956-57, 103 S.Ct. 3418, 3428, 77 L.Ed.2d 1134 (1983); *Zant v. Stephens*, 462 U.S. 862, 887-88, 103 S.Ct. 2733, 2748, 77 L.Ed.2d 235 (1983).

79. See *Hitchcock v. Dugger*, 481 U.S. 393, 397, 107 S.Ct. 1821, 1824, 95 L.Ed.2d 347 (1987); *Skipper v. South Carolina*, 476 U.S. 1, 8, 106 S.Ct. 1669, 1673, 90 L.Ed.2d 1 (1986).

80. See *Johnson v. Mississippi*, 486 U.S. —, —, 108 S.Ct. 1981, 1987, 100 L.Ed.2d 575 (1988).

81. See *Caldwell*, 472 U.S. at 341, 105 S.Ct. at 2646.

82. See *Teague*, — U.S. at — nn. 3 & 4, 109 S.Ct. at 1086 nn. 3 & 4 (Brennan, J., dissenting); compare *id.* at —, 109 S.Ct. at 1060-78 (O'Connor, J., plurality opinion) with *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965); *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967); *Desist*, 394 U.S. 244, 89 S.Ct. 1030; *Mackey*, 401 U.S. 667, 91 S.Ct. 1160; *Solem*, 465 U.S. 638, 104 S.Ct. 1338.

applicable to habeas petitioners whose convictions have become final, it is *Teague* itself. Had the majority decided Sawyer's case on the basis of the Supreme Court decisions in existence when Sawyer's case was argued and submitted to this court, the majority opinion would have granted him a new sentencing hearing. The majori-

ty instead reaches out to an opinion rendered by the Supreme Court 16 months after submission of Sawyer's case and 8½ years after Sawyer's trial to find a reason to deny him constitutional protection. That to us is a finality of sorts, a final and irretrievable absurdity.

United States Court of Appeals

FIFTH CIRCUIT

OFFICE OF THE CLERK

GILBERT F. GANUCHEAU
CLERK

March 30, 1989

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600 CAMP STREET
NEW ORLEANS, LA 70130

Ms. Elizabeth W. Cole
Attorney at Law
7031 Freret St.
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Ms. Dorothy Pendergast
Asst. District Attorney
24th Judicial District Ct.
New Courthouse
Gretna, LA 70054

No. 87-3274 - Sawyer v. Butler

(USDC No. CA-86-0223-"I"(4))

Dear Counsel:

The En Banc court requests that counsel in this case submit additional briefs discussing the relevance of the Supreme Court's recent decision in *Teague v. Lane*, 57 U.S.L.W. 4233 (1989), to Sawyer's petition. The Court wishes to know whether *Teague* precludes Sawyer from raising *Caldwell* issues in a collateral attack on his conviction. Counsel should address the following questions, although they need not limit themselves to these questions:

1. Does *Caldwell* articulate a rule that is new within the meaning of the *Teague* test? In answering this question, please discuss the significance of the Louisiana cases dealing with prosecutorial argument that diminishes the responsibility of a capital jury. See, e.g., *Steve v. Willie*, 410 So.2d 1019 (La. 1982). The Court wishes to know whether these cases rest upon state law rules, or upon the Eighth Amendment to the Constitution, and what effect, if any, they have upon the newness of Sawyer's *Caldwell* claim for *Teague* purposes.

-1-

2. Does Teague apply to collateral attacks upon a sentencing proceeding in a capital case?

3. Does Caldwell announce a rule that falls within the "fundamental fairness" exception to the Teague rule?

Sawyer's brief should be filed on or before May 12. Louisiana's brief should be filed on or before May 19.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

by Amanda K. Vockroth
Amanda K. Vockroth
Case Manager

AKV/dme

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[Closing Arguments and Jury Instructions in the Sentencing Hearing]

Argument by the state from 4:15 p.m. to 4:25 p.m.
as follows:

MR. BOUDOUSQUE:

Ladies and gentlemen, we are now at the second phase of the proceedings you were told about during the course of the voir dire. You will decide if the crime and relating circumstances fit into technical

1 definition of the law. The law states that the
2 sentence of death shall not be imposed unless the
3 jury finds beyond a reasonable doubt that at least
4 one statutory aggravating circumstance exist and
5 after consideration any mitigating circumstances
6 recommends the sentence of death be imposed. The jury
7 shall be furnished a copy with the statutory
8 aggravating and mitigating circumstances. The State is
9 going to contend there are four aggravating
10 circumstances that the jury can find without a
11 reasonable doubt. One, the following shall be
12 considered, aggravating circumstance. When the
13 offender is engaged in the perpetration or the
14 attempted perpetration of an aggravated rape or an
15 aggravated arson. Just the facts of the crime alone
16 can be considered as an aggravating circumstance. Two,
17 where the offender has been previously convicted of an
18 unrelated murder, aggravated rape, aggravated
19 kidnapping or has a significant prior history of
20 criminal activity.

21 Well you have heard Robert Sawyer own sister
22 tell you that he has been a follower of the law most
23 of his life. You also heard of a 1974 conviction where
24 the defendant took the life of a four year old child,
25 was indicted for second degree murder and was convicted
26 of involuntary manslaughter. Where the offense was
27 committed in an especially heinous and atrocious and
28 cruel manner. (The D.A. displays the photographs.)
29 Need I say more, and where the offender knowingly

1 created a risk of death or great bodily harm to more
2 than one person. There were two small children as
3 well as Cynthia Shano in that house. That will be a
4 question of fact for the jury to decide. The law
5 provides that if you find one of these circumstances
6 then what you are doing as a juror, you yourself will
7 not be sentencing Robert Sawyer to the electric chair.
8 What you are saying to this Court, to the people of
9 this Parish, to any appellate court, the Supreme Court
10 of this State, the Supreme Court possibly of the United
11 States, that you the people as a fact finding body from
12 all the facts and evidence you have heard in
13 relationship to this man's conduct are of the opinion
14 that there are aggravating circumstances as defined by
15 the statute, by the State Legislature that this is
16 the type of crime that deserves that penalty. It is
17 merely a recommendation so try as he may, if Mr.
18 Weidner tells you that each and every one of you I
19 hope you can live with your conscience and try and play
20 upon your emotions, you cannot deny, it is a difficult
21 decision. No one likes to make those type of
22 decisions but you have to realize if but for this man's
23 actions, but for the type of life that he has decided
24 to live, if of his own free choosing, I wouldn't be
25 here presenting evidence and making argument to you.
26 You wouldn't have to make the decision. This man is
27 almost thirty years old, thirty-one years old. He is
28 an adult. You heard his sister testify. I have
29 compassion and I certainly have understanding and some

1 emotions about her feelings. Although I must tell
2 you when I listened to some of the things that she
3 said concerning how beautiful that four year old child
4 was treated that I am somewhat maybe, maybe I was a
5 little harder than I should have been when I asked
6 her questions. For that I apologize, but it was only
7 an instinctive reaction on my part but the facts
8 remain there are many of us in this life, life is not
9 an easy thing but life is the most important thing we
10 know and when someone takes it in his own hands for
11 whatever reason because he wants to get it off and
12 have his joys and jollies, when he decides to take
13 another life into his hands and in this case two within
14 a five year period, then the line has to be drawn.
15 This man is never going to change. He has committed
16 two homicides in five years. You have experienced a
17 certain amount of emotions in this case. I am sure
18 your heart goes out to his sister and maybe to his
19 nephew. During the course of this trial I haven't
20 been so lucky. The only person that I've been able
21 to converse with is Mr. Beckendorf. Frances Arwood
22 is not here. I wish she could tell you what she went
23 through on September 28 when she was locked into that
24 chamber of horrors, when over that extended period of
25 time this man so savagely and brutally along with
26 Charles Lane beat, kicked, poured scalding hot water,
27 raped, set her on fire, see what I'm trying to say,
28 that Frances is not here. I didn't ask her mother to
29 come back. I thought that the emotional aspect of

1 what she had to undergo the first time was enough
2 but think about how she feels. Think about that if
3 that was your child or your wife or your relative.
4 What I'm trying to say is that it is nice and easy
5 to put Frances Arwood in the abstract but she will
6 never know another sunrise. She will not know what
7 is basic to you and me which is living. There is
8 really not a whole lot that can be said at this point
9 in time that hasn't already been said and done. The
10 decision is in your hands. You are the people that are
11 going to take the initial step and only the initial
12 step and all you are saying to this court, to the
13 people of this Parish, to this man, to all the Judges
14 that are going to review this case after this day, is
15 that you the people do not agree and will not tolerate
16 an individual to commit such a heinous and atrocious
17 crime to degrade such a fellow human being without
18 the authority and the impact, the full authority and
19 impact of the law of Louisiana. All you are saying is
20 that this man from his actions could be prosecuted to
21 the fullest extent of the law. No more and no less.
22 I submit to you when you evaluate the facts of this
23 case and you make a comparison with the atrocious
24 nature of the facts of this case, the facts of the
25 case that you heard about when little Laurie Durham,
26 four years old, lost her life, I think you will
27 decide that there are at least three or four
28 aggravating circumstances which you could reasonably
29 impose in order to justify a death penalty verdict.

1 It's all your doing. Don't feel otherwise. Don't
2 feel like you are the one, because it is very easy
3 for defense lawyers to try and make each and every one
4 of you feel like you are pulling the switch. That is
5 not so. It is not so and if you are wrong in your
6 decision believe me, believe me there will be others
7 who will be behind you to either agree with you or to
8 say you are wrong so I ask that you do have the
9 courage of your convictions. You've done the right
10 thing so far. There can be no doubt that Robert
11 Sawyer committed this crime. The evidence is strong
12 and convincing although he still denies that. He
13 still states he was so intoxicated he doesn't
14 remember anything about this crime. He gave a
15 statement two hours after the crime admitting or at
16 least telling everyone about it. I could have cross
17 examined him and gone more and more into it and gotten
18 more and more lies but his guilt has already been
19 decided.

20 I ask that you consider what I have just told you
21 and I may or may not be back to speak to you in a
22 brief rebuttal after Mr. Weidner argues. Thank you.

23 Closing argument by the Defense from 4:25 p.m. to
24 4:35 p.m. as follows:

25 MR. WEIDNER:

26 Ladies and gentlemen, I don't quite know what to
27 say. I have never been in this position before. I
28 guess I am doing exactly what Mr. Boudousque told you
29 I was going to do. The decision whether Robert Sawyer

1 lives or dies is in your hands for one very simple
2 reason. Should you decide today that he gets life
3 imprisonment, well then the issue of whether or not
4 he would be executed never comes up again. The issue
5 remains a life only if you decide that he should be
6 executed. I don't know what I can say for Robert
7 Sawyer. He is a poor miserable little human being.
8 He has had a hell of a life. He was involved in a
9 very heinous act. He has been in a mental hospital.
10 Like Doctor Arneson told you probably a sociopath.
11 We know and it is never been attempted to be rebutted
12 that Mr. Sawyer was intoxicated the day this incident
13 with Frances Arwood occurred. You obviously believe
14 that he is guilty of first degree murder. That is
15 your verdict. How can we believe, I know I can't,
16 anyone in their right mind or in possession of their
17 faculties could do something like this. I personally
18 do not agree with the death penalty. I don't think
19 there is any circumstance when anyone has the right to
20 kill another person no matter how we try to get away
21 from it. That is what we would be doing is killing
22 another person. Charles Lane is serving life
23 imprisonment. I'm going to ask you to give Robert
24 Sawyer the living death of life imprisonment. Don't
25 kill. Thank you.

26 Rebuttal argument by the State from 4:35 p.m. to
27 4:40 p.m. as follows:

28 MR. BOUDOUSQUE:

29 Mr. Weidner states that if you recommend life

1 imprisonment instead of the electric chair then you
2 will never have to worry about the issue of whether
3 or not Mr. Sawyer will receive the chair. At that
4 point in time the only thing you will have to worry
5 about is whether or not Robert Sawyer will ever be
6 back on the streets of Jefferson Parish. The man's
7 personality has already been formed. The statute
8 speaks without benefit of probation, suspension,
9 commutation of sentence. The statute does speak about
10 a pardon. The statute doesn't speak about a
11 commutation so don't think that if you vote for
12 first degree murder, I'm sorry, for life imprisonment
13 that that will be the end of this matter as it
14 relates to Robert Sawyer because it's not. He speaks
15 in terms of his personal feelings of the death penalty.
16 Such a decision is never easy to make but if Louisiana
17 law, if the law which we have in this state is to have
18 any piece, if it's to have any meaning, if it's to have
19 any impact on all the other people out on the streets
20 that are committing crimes and murders and rapes and
21 robberies, that is affecting you and me and every
22 member of your family. That has made the good people
23 of this community become prisoners in their own homes
24 in putting bars up in their own homes. They are the
25 ones who are suffering. If the statute is to have any
26 weight behind it at all, my God, ladies and gentlemen
27 this is the time to draw the line because if a man
28 can commit this type of crime, do this type of thing
29 to this woman in front of two children with a prior

1 conviction for killing a four year old child, then
2 what are the people of this Parish to believe. They
3 are going to believe what a lot of people believe,
4 there is a lot of law and a lot of judges but the judges
5 are letting the criminals out, the law never has any
6 affect. Don't you see that the criminal justice
7 system, ladies and gentlemen, is not the courts, it's
8 not the judges, it's not technicalities of defense
9 lawyers, it is nothing more than people like you and
10 me and if you are not capable of making these types of
11 decisions so well then you are right, there will be
12 a breakdown and there has been a breakdown but I will
13 tell you what imperfect is, the system is. At least
14 this man has had the occasion to be judged by twelve
15 men of his peers, twelve men and women of his peers
16 and in some other countries he may have been taken
17 out and summarily executed. He has had the due process
18 of law and then he expects you because Charles Lane
19 he did that for a reason because he wants to say well
20 Charles Lane got life imprisonment upon conviction of
21 first degree murder but this man should get the same.
22 Well if I were to tell you that Charles Lane, that I
23 was the prosecutor in that case and the evidence that
24 was presented for Charles Lane, Charles Lane never had
25 a conviction.

26 MR. WEIDNER:

27 Objection.

28 THE COURT:

29 The Court sustains that.

1 MR. BOUDOUSQUE:

2 There are aggravating circumstances possibly Mr.

3 Lane did not have.

4 MR. WEIDNER:

5 Objection again.

6 MR. BOUDOUSQUE:

7 I'm talking about aggravating circumstances.

8 THE COURT:

9 You can argue that.

10 MR. BOUDOUSQUE:

11 There are certain aggravating circumstances that
12 are involved and maybe the jury didn't find that those
13 aggravating circumstances existed and maybe the jury
14 found that as a matter of fact he was a passing
15 participant and not the main activist in this heinous
16 chain of events. This is the man. He is the one and
17 I think in your heart you know that no matter how
18 unpleasant or how difficult this type of decision may
19 be for you to make, if you really analyze it you don't
20 have a choice. There is only one verdict that can be
21 rendered in this case and there will be a strong
22 symbolism related to that penalty. You the people are
23 part of the criminal justice system. You now know how
24 it works. Now is the time and I ask that you
25 recommend because all you are doing is making a
26 recommendation. I ask that you recommend to this
27 Court and to any other Court that reviews Robert
28 Sawyer's case that as a jury based on all the facts
29 and circumstances within your knowledge you recommend

1 the imposition of the death penalty. Thank you.

2 THE COURT:

3 Ladies and gentlemen, before I begin, Charles
4 Lane was not tried in this Court by you and I ask
5 that you disregard any reference to Charles Lane's
6 trial. That trial had nothing to do with or should
7 have nothing to do with your deliberations. Whatever
8 happened to Charles Lane certainly should be of no
9 concern to you. All right.

10 Having found Robert Sawyer guilty of first degree
11 murder you must now determine whether he should be
12 sentenced to death or to life imprisonment without
13 benefit of probation, parole or suspension of
14 sentence. It is your duty to consider the circumstances
15 of the offense and the character and propensities of
16 Robert Sawyer to determine which sentence should be
17 imposed. In reaching your decision regarding the
18 sentence you must be guided by these instructions.
19 You are required by law to consider the existence of
20 aggravating and mitigating circumstances in deciding
21 which sentence to impose. The statutory aggravating
22 circumstances are listed on the sheet of paper you have.
23 The District Attorney contends that four of those
24 circumstances are applicable to this case and if you
25 look at your list you will see A, the offender was
26 engaged in the perpetration or attempted perpetration
27 of aggravated rape or aggravated arson. B, obviously
28 does not apply. C states that the offender was
29 previously convicted of an unrelated murder, aggravated

1 rape or aggravated kidnapping or I say significant
2 prior history of criminal activity. Did the
3 defendant knowingly create a risk of death or great
4 bodily harm to more than one person and if you drop
5 on down to G it states that the offense was committed
6 in an especially heinous, atrocious or cruel manner.
7 Before you decide that a sentence of death should be
8 imposed you must unanimously find beyond a reasonable
9 doubt that at least one statutory aggravating
10 circumstance exist. If you find beyond a reasonable
11 doubt that any of the statutory aggravating circumstances
12 existed you are authorized to consider imposing a
13 sentence of death. If you do not unanimously find
14 beyond a reasonable doubt any of the statutory
15 aggravating circumstances existed the life imprisonment
16 without probation or parole or suspension of sentence
17 is the only sentence that may be imposed. Even if you
18 find the existence of an aggravating circumstance you
19 must also consider any mitigating circumstances before
20 you decide a sentence of death should be imposed.
21 The law specifically list certain mitigating
22 circumstances and you have that list. These
23 mitigating circumstances are A, the offender has no
24 significant prior history of criminal activity. B,
25 the offense was committed while the offender was under
26 the influence of extreme mental or emotional disturbance.
27 C, the offense was committed while the offender was
28 under the influence or domination of another person.
29 D, the offense was committed under circumstances

1 which the offender reasonably believed provide a
2 moral justification or extension of his conduct. F,
3 at the time of the offense the capacity of the
4 offender to appreciate the criminality of his conduct
5 or to conform his conduct to the requirements of law
6 was impaired as a result of mental disease or defect
7 or intoxication. F, the youth of the offender at the
8 time of the offense. G, the offender was a principal
9 whose participation was relatively minor and H, any
10 other relevant mitigating circumstances. You will
11 note that you are authorized to consider any
12 relevant mitigating circumstances. The fact you are
13 given a list of aggravating and mitigating
14 circumstances should not cause you to infer the Court
15 believes that any of these circumstances do or do
16 not exist. The law requires that the jury be given
17 such a list in every case. Whether any of the
18 aggravating or mitigating circumstances exist is a
19 fact for you to determine based upon the evidence
20 presented. In addition to the evidence presented at
21 this sentencing hearing in deciding the sentence to
22 be imposed you may consider evidence presented during
23 the guilt determination trial that was brought you
24 earlier. In just a moment the clerk will hand you
25 two blank forms of verdicts. The first formal
26 verdict reads having found the below listed statutory
27 aggravating circumstance or circumstances and after
28 consideration of the mitigating circumstances offered,
29 the jury recommends that the defendant be sentenced to

1 death. In the event you should unanimously decide
2 the death penalty should be imposed, a space is
3 provided for you to write out the statutory circumstance
4 or circumstances unanimously found to exist. The
5 foreman will sign the form. The second formal
6 verdict reads, the jury unanimously recommends that
7 the defendant be sentenced to life imprisonment without
8 benefit of probation, parole or suspension of sentence.
9 This verdict form is to be used if you cannot
10 unanimously agree that the death penalty should be
11 imposed. If the jury decides that a life penalty
12 without probation or parole or suspension of sentence
13 should be imposed the foreman will sign that formal
14 verdict, no listing of aggravating or mitigating
15 circumstances are required if you use this second
16 verdict form. Nothing said or furnished you in these
17 instructions should be taken as an opinion of the
18 Court as to the existence or not of statutory
19 aggravating or mitigating circumstances. It is your
20 responsibility in accordance with the principles of
21 law I have instructed whether the defendant should be
22 sentenced to death or the life imprisonment. Go with
23 Mr. Miller back in the jury room.

24 (Jury retired at 4:45 p.m. The jury returned at
25 5:20 p.m.)

26 THE COURT:

27 Would you hand Mr. Miller the verdict form.

28 THE BAILIFF:

29 Louisiana versus Sawyer. Verdict, having found

1 the below listed statutory aggravating circumstance or
2 circumstances and after consideration of the
3 mitigating circumstances offered, the jury recommends
4 that the defendant be sentenced to death.

5 Aggravating circumstances found: 1.) The
6 offender was engaged in the perpetration of
7 aggravated arson, 2.) the offender was previously
8 convicted of an unrelated murder, 3.) the offense
9 was committed in an especially heinous, atrocious and
10 cruel manner. Signed Susan B. Roundtree, forewoman.

11 MR. WEIDNER:

12 Would you poll the jury.

13 THE CLERK:

14 Q Mr. Ragas, is that your verdict?

15 A Yes.

16 Q Miss Roth, is that your verdict?

17 A Yes.

18 Q Mr. Andressen, is that your verdict?

19 A Yes.

20 Q Mr. Drumm, is that your verdict?

21 A Yes.

22 Q Mr. Akerman, is that your verdict?

23 A Yes.

24 Q Mr. Cacioppo, is that your verdict?

25 A Yes.

26 Q Mr. Leaber, is that your verdict?

27 A Yes.

28 Q Mr. Pollack, is that your verdict?

29 A Yes.

1 Q Miss Roundtree, is that your verdict?

2 A Yes.

3 Q Mr. Wood, is that your verdict?

4 A Yes.

5 Q Miss Dunne, is that your verdict?

6 A Yes.

7 Q Miss Gusman, is that your verdict?

8 A Yes.

9 THE COURT:

10 That is twelve. The Court will remand Mr.
11 Sawyer to the Parish Prison and I will schedule
12 sentencing later.

13 (Recess for the day at 5:20 p.m.)

gram.²

We are unable to find, as suggested by the plaintiffs-appellants, anything in these documents that goes beyond routine or typical banking practices to support an allegation of knowing substantial assistance. *Woodward*, 522 F.2d at 97; *see also Woods*, 785 F.2d at 1012; *Ruder, Multiple Defendants in Securities Law Fraud Cases: Aiding and Abetting, Conspiracy, in Pari Delicto, Indemnification, and Contribution*, 120 U. Pa. L. Rev. 597, 646 (1972). As previously noted, the routine extension of a loan does not amount to substantial assistance. *See Seattle-First Nat'l Bank v. Carlsedti*, 678 F.Supp. 1543, 1549 (W.D.Okla.1987) (citing cases). Similarly, routine solicitation of a loan and obtaining financial and credit information for a loan is not substantial assistance. This summary judgment evidence will not support an inference that Landmark sought to cloak the principal defendants in an aura of respectability or reliability and thereby rendered knowing substantial assistance to the principals. *See Grimes, Hooper & Messer, Inc. v. Pierce*, 519 F.2d 1089 (9th Cir.1975); *see also Admiralty Fund v. City Nat'l Bank*, 677 F.2d 1315, 1316 (9th Cir.1982). The district court, therefore, properly concluded that Landmark was entitled to summary judgment.

III.

[3] In its cross appeal for Rule 11 sanctions, Landmark appeals only the denial of sanctions against the unrelated plaintiffs, i.e., those plaintiffs who purchased interests from the principal defendants in drilling partnerships other than the Walker 1-5 Program and with whom Landmark had no relationship. Landmark argues that before the unrelated plaintiffs were nonsuited, Landmark was required to engage in extensive discovery and hearings that could have been avoided if plaintiffs-appellees had made the minimal inquiry needed to show that they had no case against Landmark. Our review of the district court's denial of

2. The principals also included in the investor packets a document presenting various assumptions on how long it would take to repay the loan from income generated by the investment,

Rule 11 sanctions is controlled by our recent en banc decision in *Thomas v. Capital Security Servs., Inc.*, 836 F.2d 866 (5th Cir.1988) (en banc), in which we reaffirmed the district court's discretionary powers under Rule 11 and limited our review to an abuse of discretion. Although it is a close question, we cannot say the district court abused its discretion in denying sanctions. We are persuaded that the district court was justified in concluding that the unrelated plaintiffs could legitimately allege that they purchased partnership interests in part because they learned that Landmark was vouching for the credibility of the principals in one of their drilling programs. The district court did not abuse its discretion in determining that, for Rule 11 purposes, this alleged knowledge was enough to support the allegations that Landmark aided and abetted the principals in connection with the unrelated plaintiffs' transaction.

AFFIRMED.



Robert SAWYER, Petitioner-Appellant,

v.

Robert H. BUTLER, Sr., Warden,
Louisiana State Penitentiary,
Respondent-Appellee.

No. 87-3274.

United States Court of Appeals,
Fifth Circuit.

June 30, 1988.

Order Granting Rehearing En Banc
Aug. 25, 1988.

Petitioner appealed denial by the United States District Court for the Eastern District of Louisiana, at New Orleans, Hen-

assuming differing amounts of production from the wells. The summary judgment evidence revealed that this instrument was included without Landmark's knowledge.

ry A. Mentz, Jr., J., his petition for writ of habeas corpus. The Court of Appeals, King, Circuit Judge, held that: (1) petitioner was not denied effective assistance of counsel; (2) error in violation of Louisiana statute requiring that appointed counsel in capital case have five years' experience was harmless; and, the Court Per Curiam, held that: (3) remarks by prosecutor in closing argument at punishment stage of capital trial did not mislead jury by inducing it to feel less responsible than it should for sentencing decision.

Affirmed.

King, Circuit Judge, filed opinion dissenting in part.

1. Criminal Law §1208.1(5)

Invalid statutory aggravating circumstance did not constitutionally impair death sentence under Louisiana procedure, where jury properly found two other aggravating circumstances.

2. Criminal Law §641.13(1)

Test for ineffective assistance of counsel requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by Sixth Amendment, and showing that deficient performance so prejudiced defense that defendant was deprived of fair and reliable trial. U.S.C.A. Const.Amend. 6.

3. Criminal Law §641.13(1)

In order to make showing that counsel's performance was constitutionally deficient, defendant must demonstrate that counsel's representation fell below objective standard of reasonableness as measured by prevailing professional standards. U.S.C.A. Const.Amend. 6.

4. Criminal Law §641.13(1)

In evaluating whether counsel's alleged error has prejudiced defense, it is not enough for defendant to show that errors had some conceivable effect on outcome of the proceeding; rather, defendant must demonstrate reasonable probability that, but for counsel's unprofessional errors, result of proceeding would have been different. U.S.C.A. Const.Amend. 6.

5. Criminal Law §641.13(4), 1163(2)

Failure of defense counsel to meet Louisiana requirement of five years' experience for appointed counsel in capital case was not presumptively prejudicial, since no actual or constructive denial of assistance of counsel resulted. LSA-Cr.P. art. 512; U.S.C.A. Const.Amend. 6.

6. Criminal Law §641.13(2)

Defendant was not prejudiced by counsel's failure to question prospective jurors about their views on death penalty, where state questioned prospective jurors on this point. U.S.C.A. Const.Amend. 6.

7. Criminal Law §641.13(2)

Defendant was not prejudiced by defense counsel's failure to rehabilitate veniremen who were excused because of their views contrary to death penalty, absent demonstration that rehabilitation was possible. U.S.C.A. Const.Amend. 6.

8. Criminal Law §641.13(2)

Defendant was not prejudiced by defense counsel's objection to jury's learning of mandatory life imprisonment penalty for second-degree murder, as well as penalty for manslaughter at guilt phase, absent showing of reasonable probability that jury decision would have been different had counsel not objected to jury's learning of lesser penalties, in view of the more than ample evidence to support jury's determination that defendant was guilty of first-degree murder. U.S.C.A. Const.Amend. 6.

9. Criminal Law §641.13(6)

Defense counsel was not ineffective in failing to secure his own expert witnesses to support defendant's intoxication and toxic psychosis defenses, absent suggestion that an examination would produce type of results sought or demonstration of sufficient evidence that defendant suffered from toxic psychosis. U.S.C.A. Const. Amend. 6.

10. Criminal Law §641.13(2)

Defense counsel's waiver of closing argument, believing the evidence against defendant to be overwhelming, was not prejudicial, absent showing of what counsel

might have said at closing that would have had reasonable probability of changing the result. U.S.C.A. Const.Amend. 6.

11. Criminal Law §641.13(7)

Defendant failed to specify what other mitigating evidence was available or how that evidence could have affected jury's decision, as required to support contention that defense counsel failed to prepare competent penalty phase presentation in capital case. U.S.C.A. Const.Amend. 6.

12. Criminal Law §641.13(2)

While defense counsel's closing was cursory and perfunctory, no prejudice was affirmatively demonstrated, as required to establish ineffective assistance of counsel. U.S.C.A. Const.Amend. 6.

13. Criminal Law §1166.11(5)

Equal protection claim based on violation of Louisiana statute requiring that appointed counsel in capital case have five years' experience was subject to harmless error analysis. LSA-Cr.P. art. 512; U.S.C.A. Const.Amend. 14.

14. Criminal Law §1165(1)

Error is harmless where, after reviewing facts of case, evidence adduced at trial and impact constitutional violations had on trial process, evidence remains not only sufficient to support verdict but so overwhelming as to establish guilt of accused beyond reasonable doubt.

15. Criminal Law §1166.11(5)

Given overwhelming evidence of guilt, claim of equal protection error in failure to comply with state statute requiring that appointed counsel in capital case have five years' experience was harmless. LSA-Cr.P. art. 512; U.S.C.A. Const.Amend. 14.

16. Habeas Corpus §45.2(4)

Proper inquiry in habeas proceeding where there has been violation of state procedure is to determine whether there has been constitutional infraction of defendant's due process rights which would render trial as a whole fundamentally unfair. U.S.C.A. Const.Amend. 14.

17. Constitutional Law §268.1(6)

Criminal Law §641.13(4)

There was no due process claim based on violation of Louisiana statute requiring that appointed counsel in capital case have five years' experience, absent any demonstration of prejudice. U.S.C.A. Const. Amend. 14.

18. Criminal Law §713

Prosecutor's reference, at punishment stage of capital trial, to jury's verdict as a "recommendation" and as "only the initial step" was improper.

19. Constitutional Law §268(6)

Criminal Law §723(1)

Remarks by prosecutor in closing argument at punishment stage of capital trial did not deny defendant due process by inducing jury to feel less responsible than it should for sentencing decision, where jury was told that life-or-death decision was up to them and that execution could not be exacted without their permission. U.S.C.A. Const.Amend. 14.

Catherine Hancock, Elizabeth W. Cole, New Orleans, La., for petitioner-appellant.

John J. Molaison, Jr., Dorothy Pendergast, Asst. Dist. Atty., Gretna, La., for respondent-appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before GEE, KING and DAVIS,
Circuit Judges.

KING, Circuit Judge:

Robert Sawyer appeals from the district court's denial of his petition for writ of habeas corpus, and its concomitant entry of an order rescinding Sawyer's stay of execution. On appeal, Sawyer argues that his conviction for first degree murder should be reversed both because he was denied effective assistance of counsel and because the state trial court, by failing to comply with a state law requiring that counsel assigned in a capital case must have been admitted to the bar for at least five years, violated Sawyer's constitutional due pro-

cess and equal protection rights. In addition, Sawyer argues that the prosecutor's closing argument in the sentencing phase of his trial violated the eighth amendment by erroneously misleading the jurors concerning their role as the final arbiters of death. As we agree with the district court that Sawyer's challenges to his conviction and sentence do not warrant habeas relief, we affirm the district court's judgment.

1. The district court adopted the following statement of facts as set forth in the opinion of the Supreme Court of Louisiana in Sawyer's case:

A series of bizarre and frightful events, which led to the death of Fran Arwood, occurred at the residence where defendant was living with Cynthia Shano and Ms. Shano's two young sons. Ms. Arwood was divorced from Ms. Shano's stepbrother, but remained friendly with her and often helped her by taking care of the children. Defendant had lived with Ms. Shano in Texas for several months and had professed an intention to marry her.

On September 28, 1979, Ms. Arwood was staying with Ms. Shano and helping with the children while Ms. Shano's mother was in the hospital. Defendant and Ms. Shano went out for the evening. Defendant returned at about 7:00 o'clock the next morning with Charles Lane, whom defendant had apparently met in a barroom and had invited to the residence for more drinking and talking.

Defendant and Lane continued their drinking while listening to records. At some time during the morning, Ms. Shano left to check on her hospitalized mother. When she returned, she noticed that Ms. Arwood was bleeding from her mouth. Defendant told Ms. Shano that he had struck Ms. Arwood after an argument in which he accused Ms. Arwood of giving some pills to one of the children.

The reasons behind the events that followed are difficult to discern accurately from the record and more difficult to comprehend. However, defendant does not vigorously contest the fact that Ms. Arwood in his presence was beaten, scalded with boiling water and burned with lighter fluid, or that the ferocity of the attack and the severity of the injuries caused her to die several weeks later without ever regaining consciousness.

After the original altercation during Ms. Shano's absence, defendant and Lane, for some unexplained reason, decided that Ms. Arwood needed a bath. When she resisted, defendant struck her in the face with his fist, and both men pummeled her with repeated blows. Ms. Shano objected, but defendant locked the front door and retained the key, threatening to harm Ms. Shano if she interfered or even revealed the incident.

848 F.2d—15

1.

Robert Sawyer ("Sawyer") is a state prisoner currently incarcerated at the Louisiana State Penitentiary in Angola, Louisiana. Sawyer and Charles Lane ("Lane") were charged with first degree murder for the gruesome slaying of Frances Arwood.¹ Both were ultimately tried separately. Sawyer was represented at trial by his

Acting in concert, defendant and Lane dragged Ms. Arwood by the hair to the bathroom, stripped her naked, and literally kicked her into the bathtub, where she was subjected to dunking, scalding with hot water, and additional beatings with their fists. A final effort by Ms. Arwood to resist the sadistic actions of her tormentors resulted in defendant's kicking her in the chest, causing her head to strike either the tub or an adjacent windowsill with such force as to render her unconscious. Although she did not regain consciousness, defendant and Lane continued to use her body as the object of their brutality.

Defendant and Lane dragged her from the bathroom into the living room, where they dropped her, face down, onto the floor. Defendant then beat her with a belt as she lay on the floor, while Lane kicked her. They then placed her on her back on a sofa bed in the living room. As Ms. Shano went to the bathroom, she overheard defendant say to Lane that he (defendant) would show Lane "just how cruel he (defendant) could be". When she reentered the living room, she was struck by the pungent smell of burning flesh. She then discovered that defendant had poured lighter fluid on Ms. Arwood's body (particularly on her torso and genital area) and had set the lighter fluid afire.

Then, displaying a callous disregard for the helpless (and mortally injured) victim, defendant and Lane continued to lounge about the residence listening to records and discussing the disposition of Ms. Arwood's body. Lane fell asleep next to the beaten and swollen body of the victim.

Shortly after noon, Ms. Shano's sister and nephew came to visit. When the nephew knocked insistently, defendant gave Ms. Shano the key to open the door, and she ran screaming to the safety of her relatives. Her excited ravings ("They've killed Fran and they're trying to kill me") were incomprehensible to her nephew and sister until they looked inside and saw the gruesome scene and Ms. Arwood's beaten and blistered body. They also saw defendant sitting with his feet propped up on the edge of the couch.

In the meantime, Ms. Shano called for police and emergency units. When the authorities arrived, they took Lane and defendant to jail, and rushed Ms. Arwood to a hospital, where she subsequently died.

State v. Sawyer, 422 So.2d at 97-98.

court-appointed attorney, James Weidner ("Weidner"). Sawyer was originally represented by Wiley Beevers ("Beevers"). It was Beevers who had initially brought Weidner into the case by asking him to assist as co-counsel. Beevers subsequently withdrew from the case when Sawyer refused to accept a plea bargain offered by the prosecutor and Weidner was left as sole counsel. Upon receiving his appointment, Weidner informed the trial court that he was not a "death-qualified" attorney because he lacked five years experience as required for appointed counsel in capital cases by article 512 of the Louisiana Code of Criminal Procedure.² The trial court told Weidner to get an experienced counsel to "sit" with him. Weidner managed to secure some assistance from several other attorneys, but no "death-qualified" attorney was ever appointed as co-counsel. Neither party disputes the fact that the terms of article 512 were not complied with. Sawyer was convicted of first degree murder and sentenced to death by a jury on September 19, 1980.

His conviction and sentence were affirmed by the Louisiana Supreme Court. See *State v. Sawyer*, 422 So.2d 96 (La. 1982). Sawyer's petition for a writ of certiorari to the United States Supreme Court was granted and the case was remanded with instructions for the Louisiana Supreme Court to reconsider its ruling in light of *Zant v. Stephens*, 462 U.S. 862, 108 S.Ct. 2733, 77 L.Ed.2d 235 (1983). See *Sawyer v. Louisiana*, 463 U.S. 1223, 108 S.Ct. 3567, 77 L.Ed.2d 1407 (1983). On remand, the Louisiana Supreme Court again affirmed the death sentence, see *Sawyer v. Louisiana*, 442 So.2d 1186 (La. 1983), and Sawyer's subsequent petition for writ of certiorari was denied, see *Sawyer v. Louisiana*, 466 U.S. 981, 104 S.Ct. 1719, 80 L.Ed.2d 191 (1984). At this point, Sawyer sought state habeas relief which was ultimately unsuccessful. See *Sawyer v. Mag-*

gio, 479 So.2d 380 (La.1985); *Sawyer v. Maggio*, 480 So.2d 313 (La.1985).

Having exhausted his state remedies, Sawyer filed a federal habeas petition in the United States District Court for the Eastern District of Louisiana. In his petition, Sawyer argued, among other things, that he received ineffective assistance of counsel, and that the state trial court's failure to comply with article 512 violated his due process and equal protection rights. Moreover, Sawyer claimed that the prosecutor's closing argument in the sentencing phase of his trial erroneously misled the jury as to their role as the final arbiters of death and, therefore, violated the eighth amendment. After granting Sawyer a stay of execution, the district court assigned Sawyer's case to a magistrate for a hearing. On September 9, 1986, the magistrate submitted his proposed findings and recommended to the district court that Sawyer's petition be denied and the stay of execution be vacated. With respect to Sawyer's ineffective assistance of counsel claim, the magistrate concluded that Sawyer had failed to demonstrate that he was prejudiced by any of Weidner's allegedly deficient actions as counsel. As to the state trial court's non-compliance with article 512, the magistrate began by noting that the state trial judge, after the evidentiary hearing, concluded that the violation is not fatal to a capital conviction when the defendant actually received effective assistance of counsel. The magistrate, therefore, refused to reach the issue of whether Sawyer's due process and equal protection rights were actually violated "since any alleged breach of those rights was harmless beyond a reasonable doubt and, consequently, does not raise a federal constitutional question. *Chapman v. California*, 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705] (1967)." Finally, the magistrate concluded that the prosecutor's remarks in his closing argument during the penalty phase were

pleads to the indictment. Counsel assigned in a capital case must have been admitted to the bar for at least five years. An attorney with less experience may be assigned as assistant counsel.

2. Article 512 provides, in pertinent part:

When a defendant charged with a capital offense appears for arraignment without counsel, the court shall assign counsel for his defense. Such counsel may be assigned earlier, but must be assigned before the defendant

distinguishable from those condemned in *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), as violative of the eighth amendment. Moreover, after concluding that "[r]eference to possible appellate review should not result, in all cases, in an automatic reversal of a death penalty," the magistrate went on to conclude that since "there is no reasonable probability, that but for the prosecutor's alleged professional errors, the recommendation of the jury would have been different," resentencing would be inappropriate.

On April 8, 1987, the district court issued its ruling adopting the magistrate's findings and recommendations in an order incorporating several amendments to the magistrate's opinion.³ The district court also examined, in greater detail, the question of whether Chapman's harmless error analysis applies to the alleged constitutional violations in the instant case. The district court concluded that a Chapman analysis was appropriate since the state trial court's failure to appoint counsel with five years experience could not be classified as a violation of constitutional rights "so basic to a fair trial" as to preclude the harmless error inquiry. The district court found no merit in Sawyer's assertion that harmless error analysis can never be applied to due process or equal protection errors. Finally, the district court found that the state trial court's appointment of counsel with less than five years experience in the instant case was indeed harmless since the evidence against Sawyer was

so overwhelming as to establish his guilt beyond a reasonable doubt. Sawyer filed timely notice of appeal and was granted a certificate of probable cause to appeal and a stay of execution pending appeal. We have jurisdiction under Title 28, United States Code, section 2253.

II.

[1] On appeal, Sawyer raises three challenges to his confinement and sentence. First, Sawyer argues that he was accorded ineffective assistance by his "inexperienced appointed counsel, who was not lawfully qualified to represent a capital defendant," in violation of the sixth amendment. Next, Sawyer argues that the state trial court's failure to comply with article 512 violated Sawyer's constitutional due process and equal protection rights. He contends that the district court erred in applying a harmless error analysis to his claims for they are related to the integrity of the trial process itself and, as such, are not proper subjects for a Chapman inquiry. Finally, Sawyer contends that certain improper remarks by the prosecutor in closing arguments at the sentencing phase of Sawyer's trial erroneously misled the jury as to their role in the death penalty determination and, therefore, violated the eighth amendment as interpreted in *Caldwell*. Sawyer also takes issue with the district court's imposition of a prejudice requirement on his *Caldwell* violation claims. We will consider each of these arguments in turn.⁴

previously been convicted of an unrelated murder. Sawyer, 422 So.2d at 101. The Louisiana Supreme Court concluded that the evidence of Sawyer's prior conviction was properly admitted, however, and did not inject an arbitrary factor into the sentencing proceeding. *Id.* at 104. Sawyer's argument to the contrary is of no moment. As we have stated:

The fact that an invalid statutory aggravating circumstance has been found does not constitutionally impair a death sentence under the Louisiana procedure where the jury has also found another aggravating circumstance which is supported by the evidence and is valid under the law and of itself suffices to authorize the imposition of the death penalty. *James v. Butler*, 827 F.2d 1006, 1013 (5th Cir. 1987); see also *Byrne v. Butler*, 843 F.2d 501, 501, 514-15 (5th Cir.1988).

3. For the balance of this opinion, we will refer to the magistrate's findings and recommendations, as corrected by the district court, and the district court's additions to the magistrate's report collectively as the district court's conclusions.

4. Sawyer also argues briefly that since the jury was allowed to weigh an aggravating circumstance that was later held to have been improperly submitted, his death sentence was imposed in violation of the eighth amendment. Specifically, the jury found that Sawyer had previously been convicted of an unrelated murder because he was indicted in Arkansas for second degree murder in the killing of a child, and pled guilty to involuntary manslaughter for that crime. The Louisiana Supreme Court, however, ruled that a conviction for involuntary manslaughter could not support a finding that Sawyer had

III.

A. Ineffective Assistance of Counsel

Sawyer points to a number of alleged deficiencies in Weidner's performance at trial as support for his allegation of ineffective assistance of counsel. Specifically, Sawyer notes that Weidner: (1) failed to ask the jurors about their attitudes towards the death penalty during voir dire; (2) objected to the jury's learning of the mandatory life imprisonment penalty for second degree murder, as well as the penalty for manslaughter at the guilt phase; (3) failed to object to several inadmissible, inflammatory remarks by the prosecutor; (4) produced no defense experts on the subjects of intoxication and toxic psychosis even though he had chosen them as his chief defenses to negate the specific intent required for first degree murder; (5) failed to make a closing argument at the guilt phase of trial; and (6) failed to prepare a competent penalty phase presentation.

[2,3] Sawyer's claims of ineffective assistance of counsel must be evaluated under the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2062, 80 L.Ed.2d 674 (1984). The test requires first, "a showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment," and second, a showing that the deficient performance so prejudiced the defense that the defendant was deprived of a fair and reliable trial. *Uresti v. Lynaugh*, 821 F.2d 1099, 1101 (5th Cir.1987) (quoting *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2084). The burden that *Strickland* imposes on a defendant is severe. *Proctor v. Butler*, 831 F.2d 1251, 1255 (5th Cir.1987). In order to satisfy the deficiency prong of the *Strickland* test, for example, the defendant must demonstrate

Sawyer does not dispute that the jury properly found two other aggravating circumstances, namely that the crime was committed in a particularly heinous manner and that it occurred during the perpetration of arson. The Louisiana Supreme Court concluded that the evidence was clearly sufficient to support the jury's findings with respect to those aggravating circumstances. Sawyer, 422 So.2d at 101, and "[t]hat court's determination is entitled to great weight in our review." *Wingo v. Blackburn*, 786 F.2d

that counsel's representation fell below an objective standard of reasonableness as measured by prevailing professional standards. *Martin v. McCotter*, 796 F.2d 813, 816 (5th Cir.1986), cert. denied, — U.S. —, 107 S.Ct. 935, 93 L.Ed.2d 985 (1987). Given the almost infinite variety of possible trial techniques and tactics available to counsel, we must be careful not to second guess legitimate strategic choices which may now, under the distorting light of hindsight, seem ill-advised and unreasonable. We have stressed that, "great deference is given to counsel, 'strongly presuming that counsel has exercised reasonable professional judgment.'" *Martin*, 796 F.2d at 816 (quoting *Lockhart v. McCotter*, 782 F.2d 1275, 1279 (5th Cir.1986), cert. denied, — U.S. —, 107 S.Ct. 873, 93 L.Ed.2d 827 (1987)).

[4,5] In evaluating whether counsel's alleged errors prejudiced the defense, "[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Strickland*, 466 U.S. at 693, 104 S.Ct. at 2067. Rather, the defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. at 2068. "It is not our role to assume the existence of prejudice." *Czeres v. Butler*, 833 F.2d 59, 64 (5th Cir.1987). On the contrary, *Strickland* requires that the defendant affirmatively prove prejudice. *Id.* *Strickland* also authorizes us to proceed directly to the question of prejudice. Therefore, if Sawyer fails to demonstrate prejudice, the alleged deficiencies in Weid-

454, 655 (5th Cir.1986), cert. denied, — U.S. —, 107 S.Ct. 1984, 95 L.Ed.2d 823 (1987). In fact, Sawyer does not argue that the evidence was insufficient to support the other aggravating circumstances. Those aggravating circumstances were sufficient to authorize the imposition of the death penalty and Sawyer has not challenged their legal validity in this case. Sawyer's sentence, therefore, was not constitutionally impaired by the submission of the invalid aggravating circumstance. See *Byrne*, at 515.

ner's performance need not even be considered. See *Strickland*, 466 U.S. at 698-99, 104 S.Ct. at 2070; *Schwander v. Blackburn*, 750 F.2d 494, 502 (5th Cir.1984). Since both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact, we must make an independent determination of whether the representation accorded Sawyer by counsel passed constitutional muster. *Ricalday v. Proctor*, 736 F.2d 203, 206 (5th Cir.1984); *Truss v. Maggio*, 731 F.2d 288, 292 (5th Cir.1984). With these considerations in mind, we now turn to the merits of Sawyer's contentions.⁵

[6,7] With respect to Sawyer's objections to voir dire, we need not decide whether counsel's failure to question prospective jurors about their views on the death penalty was professionally unreasonable because Sawyer has failed to demonstrate prejudice. Sawyer does not dispute the fact that the State questioned the prospective jurors on this point. Rather, Sawyer asserts that because "the actual value of the rights [counsel] so casually sacrificed cannot be measured in concrete terms," *Strickland* would excuse his failure to affirmatively demonstrate—or concretely allege—prejudice from counsel's actions. Sawyer's novel interpretation of *Strickland* is unsupported by authority and runs counter to our interpretation of that case. Sawyer also alludes to the prejudice which resulted from counsel's failure

to rehabilitate veniremen who were excused because of their views contrary to the death penalty. Sawyer fails, however, to demonstrate that rehabilitation was possible. Unsupported allegations and pleas for presumptive prejudice are not the stuff that *Strickland* is made of. We find no merit in Sawyer's allegations that counsel's voir dire performance constituted ineffective representation of counsel.

[8] At trial, Weidner objected to the jury's learning of the mandatory life imprisonment penalty for second degree murder, as well as the penalty for manslaughter at the guilt phase. Sawyer asserts that he was prejudiced by this objection because "[w]ithout this information, the jury would never realize that a conviction for second degree murder carried a mandatory life sentence, so that a vote against first degree would both remove the possibility of a death sentence and also insure permanent incarceration." By objecting to the jury's receipt of this information, Sawyer argues, Weidner deprived his client of any realistic opportunity for a second degree murder conviction and a chance of avoiding the penalty phase of trial. The district court, however, concluded that Sawyer's argument was without merit since "it was possible for the jury to recommend a sentence of life imprisonment on his conviction of first degree murder," and because Sawyer's "contention that the jury might have returned a verdict of manslaughter, had it

5. In addition to his specific allegations of Weidner's ineffectiveness, Sawyer also contends that Weidner's failure to meet article 512's standards for death qualification rendered his assistance as counsel unreasonable *per se* under "prevailing professional norms." See *Strickland*, 466 U.S. at 688, 104 S.Ct. at 2065. Sawyer asserts that "prejudice from this form of inadequate representation may be presumed." We need not address the first contention for we do not agree with Sawyer that counsel's failure to meet the state law standard was presumptively prejudicial. In support of this proposition, Sawyer relies on language from *Strickland* to the effect that prejudice may be presumed: (1) where "prejudice ... is so likely that case by case inquiry is not worth the cost," and (2) where the impairment of the sixth amendment right is "easy to identify and, for that reason ... easy for the government to prevent." See *id.* at 692, 104 S.Ct. at 2067. Sawyer's reading of *Strick-*

land as establishing a generally applicable two-pronged test for presumptive prejudice is clearly in error. The Court in *Strickland* included the aforementioned language merely to illustrate why it presumes prejudice where there has been an actual or constructive denial of the assistance of counsel altogether, or where the state has prevented counsel from assisting the accused during a critical stage of the proceedings. See *id.* (citing *United States v. Cronic*, 466 U.S. 648, 657 & n. 25, 104 S.Ct. 2039, 2047 & n. 25, 80 L.Ed.2d 657 (1984)). The state trial court's failure to comply with article 512 did not result in an actual or constructive denial of the assistance of counsel. Therefore, we are unwilling to extend *Strickland*'s limited relaxation of the prejudice requirement to the facts of this case. Sawyer's claims are subject to the general requirement that the defendant affirmatively prove prejudice.

known he could have received twenty years imprisonment, has even less support in light of the evidence."

Once again, Sawyer has failed to affirmatively demonstrate prejudice. He has not shown a reasonable probability that, absent Weidner's objection to the jury's learning of lesser penalties, the jury decision would have been different. We note first that the evidence adduced at trial was more than ample to support the jury's determination that Sawyer was guilty of first degree murder.⁶ Moreover, Sawyer fails to demonstrate a reasonable probability that the jury would have returned a verdict of guilty to either of the lesser offenses. Finally, as for avoiding the penalty phase of trial in hopes of securing a term of life imprisonment, Sawyer had consistently refused to accept such an offer by way of a plea bargain.⁷

6. As the district court noted, "[Sawyer] did not seriously contest at trial his involvement in the beating and burning of the victim." In any event, the testimony of Cynthia Shano, an eyewitness to the incident, as well as the other testimony and physical evidence introduced at trial, provided a sufficient factual underpinning for the jury's verdict. The Louisiana Supreme Court found that: (1) "[t]here was ... ample evidence from which a rational juror could have concluded beyond a reasonable doubt that [Sawyer] was engaged in the perpetration of aggravated arson;" (2) Sawyer's actions evinced the specific intent to inflict great bodily harm; and (3) the evidence was "plainly sufficient" to support the conviction. *State v. Sawyer*, 422 So.2d at 99. "That court's determination is entitled to great weight in our review." *Wingo v. Blackburn*, 786 F.2d 654, 655 (5th Cir.1986), cert. denied, — U.S. —, 107 S.Ct. 1984, 95 L.Ed.2d 823 (1987).

Sawyer's chief defense at trial was that he lacked the specific intent to commit first degree murder due to intoxication. In reviewing this claim, the Louisiana Supreme Court concluded that "the jury reasonably rejected the defense." *State v. Sawyer*, 422 So.2d at 99. The Louisiana Supreme Court went on to hold that "[t]here was ample evidence from the testimony of the arresting officer and Ms. Shano from which a rational juror could have found that [Sawyer] acted with specific intent, despite his excessive consumption of alcohol." *Id.* Our review of the record shows this conclusion well supported by the evidence. Sawyer has failed to demonstrate otherwise.

7. Sawyer's assertions of prejudice are further belied by Weidner's testimony at the state habe-

Next, Sawyer contends—however perfunctorily—that Weidner's failure "to object to inadmissible, inflammatory statements by the prosecutor" constituted an example of Weidner's prejudicial representation. Sawyer complains of Weidner's failure to object "to the prosecutor's use of facts not in evidence during voir dire, which facts were never established at trial." Specifically, Sawyer complains of references to the use of a hammer in the commission of the crime. The district court concluded that the prosecutor's reference to the hammer, when "viewed in perspective to the actual torture and brutality inflicted upon the victim, could have had only an inconsequential effect on the jury's verdict." Moreover, at trial, Weidner objected to the testimony of a state witness who alluded to the use of a hammer during the attack, and requested a mistrial. The trial court denied the request but instruct-

as hearing. At the hearing, Weidner gave the following explanation for his actions:

A.
My reasoning was that I didn't want the jurors to know the penalty for manslaughter was, you know, was twenty-one years. I didn't want them to know that. And that was basically a concession to Robert Sawyer. He was—Robert was insisting that we argue for manslaughter. And in light of the facts of the case, you know, and I explained to Robert I had, you know, "You're asking me to blow whatever credibility I may be able to build with the jury by doing that, especially if they find out that it's a twenty-one year sentence. You know, it's a relatively light sentence: they're going to figure out real quick that you, you know, with the other things, that you could be out of jail relatively soon if they find you guilty of manslaughter."

So, kind of as a compromise between Robert, you know, I agreed we won't let them know what any of the penalties are. Let's try to set it up so that the jury knows that it's death or something else.

Q. So, Mr. Sawyer's anticipation in that area consisted of his instructing you to argue for manslaughter, and not for second degree murder?

A. Robert had consistently—he had been informed as late as the morning we began the trial that he could plead guilty to first degree murder without the death penalty. And he consistently refused and said "You tell them I will plead guilty to manslaughter and nothing else."

ed the jury that "until now there has been no testimony regarding any hammer by any other prior witness so I am going to ask you to disregard those comments and that statement by the witness and don't let that statement prejudice Mr. Sawyer in any way." Sawyer's assertion, therefore, is without merit.

[9] Sawyer's next objection to Weidner's performance concerns counsel's use of expert testimony to support Sawyer's intoxication and toxic psychosis defenses. Sawyer complains that Weidner failed to secure his own expert witnesses and instead relied on "state" experts—psychiatrists who had been appointed to a pre-trial lunacy commission charged with determin-

ing whether Sawyer was competent to stand trial—who gave damaging testimony. Each of the psychiatrists in question examined Sawyer for approximately half an hour in connection with the competency proceeding and concluded that Sawyer understood the nature of the charges against him and could assist his attorney in his defense. Weidner was successful in eliciting testimony from them which supported the toxic psychosis defense.⁸ In his habeas petition, Sawyer complains that these opinions were based upon a set of hypothetical questions only, and that Weidner should have procured an expert who could have testified as to the actual effect of alcohol on Sawyer. As the district court noted, "[Sawyer] does not suggest that type of

8. The following excerpts from the testimony at trial are instructive:

Q. [By Weidner to Doctor Albert DeVilliere] Doctor, on approximately September the 27th, 1979 at some time around the time of 8:00 o'clock in the evening, Robert Sawyer went out to various lounges and began drinking. He drank a combination of MD 20/20 wine, shots of straight whiskey, beer, continued drinking without sleep from say approximately 8:00 p.m. in the evening, all night, his condition has been described at approximately 7:00 a.m. the next morning on September 28 when arriving home he was staggering drunk, barely able to walk.

A. What time?

Q. Approximately 7:00 a.m. in the morning. This is after being drunk all night long, continued to drink MD 20/20 wine at that time. At some time during the next five to six hours some very heinous acts occurred. At approximately 1:30 in the afternoon Robert Sawyer was described as sitting on the floor with his legs crossed looking glassy eyed and appearing to be in a stupor. This description given by a lay person such as myself, not by any physician.

With the facts given to you from that hypothesis, Doctor, can you render an opinion as to the condition you believe Robert Sawyer was in during the time.

A. Well based on this information it is very possible a person under a great deal of alcohol and drinking continuously and assuming that the condition described is described by a person is fairly reasonable, a fairly reasonable individual who can assess the situation, you could see he was somewhat of a toxic psychosis. That he was probably, you can't say definitely, but that he probably was suffering with a toxic psychosis.

Q. Doctor, a person who is suffering from toxic psychoses is it possible for them to form an intent or to actively desire something to happen?

A. If you make the diagnosis of toxic psychoses it would hardly be likely that that person could form intent to do anything but he is liable to act out in a number of different ways.

Q. Now Doctor, in layman's terms could a person in this state, in other words in the state we have described with this amount of alcohol be in a stupor, I'm talking about the layman's definition of forming an intent or actively desiring something to happen, could they do that?

A. If you describe a person having the toxic psychoses it is highly unlikely they would be able to do that. Then you have, they could form intent in doing things, their behavior would not be erratic. They could have planned out behavior.

Q. [By Weidner to Doctor Genevieve Arneson] Would you give us that opinion?

A. Well it is my opinion if Mr. Sawyer drank that much alcohol and his behavior towards the victim is as described by witnesses—

Q. Speak up.

A. Mr. Sawyer had drank that much alcohol and his behavior toward the victim is as described by witnesses, if his behavior is that described by a police officer who came to the house after they were called and he was simply sitting there, with his feet up near the head of the victim, then it would be my opinion that he was, he was psychotic and it was a toxic psychosis secondary to the alcohol.

Q. Doctor, when a person is in a toxic psychosis are they able to form intent?

A. No, not in the usual sense.

examination would produce the type of results he seeks or that those results would even be obtainable." In addition, Doctor Albert DeVilliers, one of the two experts, testified both at trial and during the sanity hearing that a physician would have to have been at the scene of the crime during its commission to be in a position to render an opinion on Sawyer's intent or the effect of toxic psychosis on that intent at the time of the crime. Finally, as the district court concluded, Sawyer has failed to demonstrate sufficient evidence that he suffered from toxic psychosis to support his claims. His assertions on this point, therefore, are without merit.

Sawyer also points to Weidner's waiver of closing argument at the guilt phase of trial. Sawyer asserts that "[a] failure to give a closing argument constitutes a clear breakdown in the adversary process under [Strickland] as the jury must infer that the defense counsel who waives argument has abandoned his client's case, and has nothing to say because he believes him to be guilty." Weidner testified during the state evidentiary hearing that his deliberate decision to dispense with closing argument was based on two separate considerations. First, having dealt with the prosecutor in other trials, Weidner knew that the prosecutor tended towards "mild" closing arguments and "saved all of his big guns" for rebuttal. Therefore, "all [Weidner] could see closing argument was going to do in the guilt phase of the trial was give [the prosecutor] a chance to come back behind [him], show them the picture again ... and just make it worse." Second, Weidner realized the strong case the state had against Sawyer as to his guilt and felt that the best hope for salvaging anything for Sawyer was in the penalty phase, where Weidner hoped for a recommendation of life imprisonment. To further any possibility for success in the penalty phase, Weidner decided not to risk his credibility with the jury by advancing arguments that the jury might perceive as unsupportable.

[10] The district court concluded that "[w]hile an attorney's decision to waive closing argument might ordinarily deprive

a defendant of the effective assistance of counsel, we do not find that to be the result in the case before us." We agree that the waiver of closing argument was not prejudicial on the facts before us. Weidner believed the evidence against Sawyer to be "overwhelming." That view seems to have been shared by all of the attorneys familiar with the case. Beavers, for example, was "convinced that there was overwhelming weight of evidence" against Sawyer and "[he] was concerned ... about the high probability of a death penalty should [Sawyer] proceed to trial." Samuel Dalton, an attorney who testified for Sawyer at the state habeas evidentiary hearing, also recalled "that the evidence of the homicide was overwhelming." Moreover, we note that closing argument was not needed to organize and explain the defense position. The district court concluded that "[u]nder the circumstances, the jury could not help but to have understood the nature of Sawyer's defense." After a thorough review of the record, we find no error in the district court's conclusion that the jury was fairly apprised of the nature of Sawyer's defense during voir dire and Weidner's opening statement, and that the testimony of defense witnesses as to aspects of the defense theory was simple and direct.

Sawyer's assertions of prejudice are unsupported by the record. He has failed to demonstrate what counsel might have said at closing that would have a reasonable probability of changing the result of the trial and therefore, in light of Weidner's tactical considerations and the strong evidence against Sawyer, we are unprepared to find that the waiver of closing argument here was prejudicial.

[11] Finally, Sawyer contends that Weidner failed to prepare a competent penalty phase presentation. Specifically, Sawyer points to Weidner's alleged failure to conduct sufficient investigation and uncover relevant mitigating evidence. Sawyer fails, however, to specify what other mitigating evidence was available or how that evidence could have affected the jury's decision. For example, Sawyer complains that Weidner could have called other family

witnesses who would have been available to testify about mitigating circumstances. Yet, Sawyer neither describes the substance of that potential testimony nor details how the evidence uncovered would have done more than simply duplicate the testimony of Sawyer's sister and brother-in-law. He also complains that Weidner did not spend enough time preparing the witnesses to testify. It is clear, however, that brevity of consultation is insufficient to warrant habeas relief. *Schwander*, 750 F.2d at 499.

[12] Sawyer also points to Weidner's closing argument as an example of attorney incompetence. In that closing, Weidner reiterated several dominant themes of his case: (1) that the jury bears a great responsibility and that they should be lenient by not "killing" Sawyer; (2) that the death penalty is improper under any circumstances; and (3) that Sawyer lived through a difficult childhood, had been in a mental hospital and had been drunk during the commission of the offense. While Weidner's closing was, as the district court noted, cursory and perfunctory, Sawyer has failed to affirmatively demonstrate prejudice. The closing was adequate to inform the jury of the defense's position. In addition, Sawyer has not articulated how Weidner's closing affected the jury's decision or could have been improved. Weidner's penalty phase presentation was imperfect but Sawyer has failed to demonstrate that it was constitutionally improper under *Strickland*.

For the foregoing reasons, we conclude that since Sawyer has failed to affirmatively demonstrate prejudice from any of Weidner's allegedly deficient actions as counsel, Sawyer's ineffective assistance claim must fail.

B. Equal Protection and Due Process

Sawyer claims that the state trial court's refusal to comply with the terms of article

9. As the Court stressed in *Van Arsdall*: The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process

512 violated his rights to equal protection. We need not, and most certainly do not, reach the question of whether this violation of state law actually rose to the level of an equal protection violation. Even if Sawyer could prove an equal protection violation, that violation would still be subject to a harmless error analysis and, under such an analysis, would clearly fail.

In *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), the Supreme Court rejected the notion that errors of constitutional dimension necessarily require reversal of criminal convictions. *Id.* at 21-22, 87 S.Ct. at 826. Since *Chapman*, the Court has "repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986); see also *Rose v. Clark*, 478 U.S. 570, 106 S.Ct. 3101, 3105, 92 L.Ed.2d 460 (1986). Despite the strong interests that support the harmless error doctrine,¹⁸ however, the Court has recognized that some constitutional errors require reversal without regard to the evidence in the particular case. *Rose*, 106 S.Ct. at 3106. This limitation recognizes "that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." *Chapman*, 386 U.S. at 23, 87 S.Ct. at 827-828 (emphasis added).

[13] The Court in *Rose* sought to clarify this notion:

The State of course must provide a trial before an impartial judge, with counsel to help the accused defend against the State's charge. Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or inno-

by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error. *Van Arsdall*, 475 U.S. at 681, 106 S.Ct. at 1436 (citations omitted).

cence, and no criminal punishment may be regarded as fundamentally fair. *Rose*, 106 S.Ct. at 3106 (citations omitted). Harmless error analysis, therefore, "presupposes a trial, at which the defendant, represented by counsel, may present evidence and argument before an impartial judge and jury." *Id.* (citing *Van Arsdall*, 475 U.S. at 681, 106 S.Ct. at 1436). As the Court stated in *Rose*, "[e]ach of the examples *Chapman* cited of errors that could never be harmless either aborted the basic trial process, or denied it altogether." *Rose*, 106 S.Ct. at 3106 n. 6. Therefore, "while there are some errors to which *Chapman* does not apply, they are the exception and not the rule. Accordingly, if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless error analysis." *Id.* at 3106-07. Sawyer has failed to overcome that presumption.

We agree with the district court that a state law right to "death-qualified" counsel of five years experience is not included in *Chapman*'s "basic to a fair trial" category. Sawyer concedes that the right to a five year attorney is not itself a federal constitutional right. He argues, however, that "the state's arbitrary abrogation of that right may give rise to an equal protection ... violation." This federal constitutional right, the argument continues, is basic to a fair trial under *Chapman* "in the context of a breakdown in the state-guaranteed trial machinery in a capital case." We do not agree. The alleged constitutional violation in the instant case neither aborted the basic trial process nor denied it altogether, for Sawyer received the effective assistance of counsel.¹⁹ "The thrust of the many constitutional rules governing the conduct of criminal trials is to ensure that those trials lead to fair and correct

18. The Court in *Rose* placed a great deal of emphasis on the error's potential effect on the factfinding process at trial. *Rose*, 106 S.Ct. at 3106. Specifically, the Court emphasized the deleterious effect which errors such as judicial bias or denial of counsel might have on the composition of the record. *Id.* at 3107 n. 7. Where the error in question does not affect the record, "[e]valuation of whether the error preju-

judgments." *Id.* at 3107. Recognizing that "the Constitution entitles a criminal defendant to a fair trial, not a perfect one," *Van Arsdall*, 475 U.S. at 681, 106 S.Ct. at 1436, we conclude that the state trial court's failure to comply with article 512 does not compare with the kind of errors that have been found to automatically require reversal of an otherwise valid conviction. Sawyer's equal protection claim, therefore, was properly subjected to a harmless error analysis by the district court.

[14,15] Having determined that a harmless error analysis is appropriate in this case, we must turn to the question of whether the state trial court's appointment of counsel with less than five years experience was indeed harmless. An error is harmless where, after reviewing the facts of the case, the evidence adduced at trial, and the impact the constitutional violations had on the trial process, the evidence remains not only sufficient to support the verdict but so overwhelming as to establish the guilt of the accused beyond a reasonable doubt. *United States v. Hastings*, 461 U.S. 499, 512, 103 S.Ct. 1974, 1982, 76 L.Ed.2d 96 (1983); *Germany v. Estelle*, 639 F.2d 1301, 1303 (5th Cir. March 1981), cert. denied, 454 U.S. 850, 102 S.Ct. 290, 70 L.Ed.2d 140 (1981); *Harryman v. Estelle*, 616 F.2d 870, 876 (5th Cir.), cert. denied, 449 U.S. 860, 101 S.Ct. 161, 66 L.Ed.2d 76 (1980). Given the overwhelming evidence of guilt presented at Sawyer's trial, we agree with the district court that the state trial court's error was harmless beyond a reasonable doubt. Sawyer's equal protection claim, therefore, must fail.

[16,17] Sawyer's due process claim is also meritless. Where there has been a violation of state procedure, the proper inquiry "is to determine whether there has

diced respondent ... does not require any difficult inquiries concerning matters that might have been, but were not, placed in evidence." No such difficult inquiries are required in the instant case. The failure to appoint five year counsel did not affect the composition of the record in such a way as to prevent an appellate court from evaluating the potential harm to Sawyer.

been a constitutional infraction of the defendant's due process rights which would render the trial as a whole 'fundamentally unfair.'" *Manning v. Warden, Louisiana State Penitentiary*, 786 F.2d 710, 711-12 (5th Cir.1986) (quoting *Nelson v. Estelle*, 642 F.2d 903, 906 (5th Cir. Unit A April 1981)). In order to show that his trial was fundamentally unfair, Sawyer must demonstrate that some prejudice resulted from the state trial court's failure to appoint counsel with five years experience. See *Manning*, 786 F.2d at 712. As we explained earlier, Sawyer has failed to demonstrate prejudice and, therefore, his claim must fail.¹¹

C. Caldwell Violation ¹¹

Finally, Sawyer maintains that certain remarks by the prosecutor in closing argument at the punishment stage of his trial violate the rule of *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) and require that his sentencing process be redone.

Caldwell is a rule of narrow application. It applies only to comments that mislead a jury in the capital sentencing process by inducing it to feel less responsible than it should for the sentencing decision. *Darden v. Wainwright*, 477 U.S. 168, 183-84 n. 15, 106 S.Ct. 2464, 2473 n. 15, 91 L.Ed.2d 144, 159 n. 15. The rule is well illustrated by the case in which it was laid down.

In *Caldwell*, the defendant had murdered the female proprietor of a small, rural bait and grocery store in the course of a robbery. Defense counsel, unable to find much comfort in relevant fact or law, took refuge in rhetoric, dwelling at some length on the Sixth Commandment, the

Savior, the Crucifixion, mercy, forgiveness and certain of the less desirable aspects of being electrocuted. In response, the prosecuting attorney attacked the defense for cynically heaping undue responsibility upon the jury, while the judge concurred—overruling an objection to the argument and directing its continuance:

ASSISTANT DISTRICT ATTORNEY: Ladies and Gentlemen, I intend to be brief. I'm in complete disagreement with the approach the defense has taken. I don't think it's fair. I think it's unfair. I think the lawyers know better. Now, they would have you believe that you're going to kill this man and they know—they know that your decision is not the final decision. My God, how unfair can you be? Your job is reviewable. They know it. Yet the ...

COUNSEL FOR DEFENDANT: Your Honor, I'm going to object to this statement. It's out of order.

ASSISTANT DISTRICT ATTORNEY: Your Honor, throughout their argument, they said this panel was going to kill this man. I think that's terribly unfair.

THE COURT: Alright, go on and make the full expression so the jury will not be confused. I think it proper that the jury realizes that it is reviewable automatically as the death penalty commands. I think that information is now needed by the jury so they will not be confused.

ASSISTANT DISTRICT ATTORNEY: Throughout their remarks, they attempted to give you the opposite, sparing the truth. They said "Thou shalt not kill." If that applies to him, it applies to you, insinuating that your decision is the final decision and that they're gonna

fundamentally unfair, it would seem that the violation could never be harmless. Because we find no due process violation in the case at bar, however, we see no need to reconcile the conceptual difficulties, or to determine whether harmless error analysis can ever be appropriately applied to a due process claim.

12. The remainder of the opinion and the result represent the views of the panel majority, Judges Gee and Davis. The views of Judge King are set forth in her appended dissent.

11. In the instant case, the district court applied a harmless error analysis to Sawyer's due process claims and found that any alleged violation was in fact harmless. We have found that there was no due process violation, since Sawyer's trial was not rendered fundamentally unfair by the state trial court's failure to appoint death-qualified counsel. Therefore we need not decide whether the district court's analysis was appropriate. We note that there are certain conceptual difficulties inherent in applying a *Chapman* analysis to a due process claim for, if the violation of state law rendered the trial

take Bobby Caldwell out in the front of this Courthouse in moments and string him up and that is terribly, terribly unfair. For they know, as I know, and as Judge Baker has told you, that the decision you render is automatically reviewable by the Supreme Court. Automatically, and I think it's unfair and I don't mind telling them so.

Caldwell, 472 U.S. at 325-26, 105 S.Ct. at 2637-38 (emphasis added).

The Supreme Court, speaking through Justice Marshall—whose consistent view has long been that capital punishment is forbidden by the Constitution in any case whatever—declared this capital sentence unenforceable because it was imposed by a jury that had been misled by the judge and prosecutor about its critical and central role in the sentencing procedure. Concluding that the prosecutor's comments rendered the sentencing proceeding fundamentally unfair, a divided court required resentencing.

A considerable extension of *Caldwell* would be required to accommodate Sawyer's contentions. In our view, a most critical factor in *Caldwell* was the trial judge's approval and encouragement of the prosecutor's tendentious response to defense counsel's spread-eagled oratory.¹² As our Brethren of the Eleventh Circuit have observed:

Because of the trial judge's agreement with the prosecutor's comments, it was as if the jury received an erroneous instruction from the court at the sentencing phase of a capital proceeding, thus ... mandating reversal.

Tucker v. Kemp, 802 F.2d 1293, 1295 (11th Cir.1986) (en banc), cert. denied, — U.S. —, 107 S.Ct. 1369, 94 L.Ed.2d 529 (1987).

The Supreme Court took a similar view of the passage, observing that the judge "not only failed to correct the prosecutor's remarks, but in fact openly agreed with them; he stated to the jury that the remarks were proper and necessary, strongly implying that the prosecutor's portrayal of

13. No criticism is implied; counsel had few, if any, other courses open to him and did what he

the jury's role was correct." *Caldwell*, 472 U.S. at 339, 105 S.Ct. at 2645. The comparable proceedings here, while falling short of perfection as do most actual trials, are a far cry from those in *Caldwell*. The respect in which they approach it most closely is in the remarks of the prosecutor; in all other respects of significance, they resemble if not at all. We do not condone the remarks in question and we shall discuss them in a moment. Before doing so, however, we think it appropriate to attempt to put the rule of *Caldwell* into a broader context and to sketch out a general approach for dealing with alleged breaches of it.

A general survey of the authorities indicates, as common sense supports, that the *Caldwell* problem results from prosecutorial attempts to counter a particular set of last-resort arguments by the defense in capital cases. Given that in most such cases verdicts must be unanimous, it necessarily follows that, when all else seems lost, counsel may seek to persuade at least one juror (if no more) that: he or she is being asked to "kill" the defendant, that killing is always wrong, that even evidence that seems absolutely conclusive is sometimes not, that at its best human judgment is fallible, that if the defendant is erroneously executed no correction of the error is possible, and that at all events mercy is better than retribution. Taken together, these are formidable arguments, arguments that can be made in any case whatever, arguments all of which are in varying degrees true. One response which they sometimes evoke from the prosecutor is an exhortation to the jury to view its responsibility as a joint, rather than an individual, one; and several varieties of that response were made in this case, two permissible, one dubious.

The first called on the jury to view itself as the representative of the citizenry, as "we the people," declaring by its verdict that the acts of the defendant in torturing his victim to death were intolerable and

could for his client with his back to the wall.

should call down upon him the full force of the law. Another such argument appealed to their group spirit as jurors, assuring them that they did not stand alone in whatever they did but rather functioned together as an institution:

It's all your doing. Don't feel otherwise. Don't feel like you are the one, because it is very easy for defense lawyers to try and make each and every one of you feel like you are pulling the switch. That is not so.

So far, so good; fair argument.

[18] The next sentence, however, embarks upon a far different and more dubious sort of "joint responsibility" argument, one that vaguely and generally reassures the jury that "if you are wrong in your decision, believe me, there will be others who will be behind you to either agree with you or to say you are wrong...." Who these "others" were, the jury was not told. In addition, at various points in the argument the prosecutor improperly referred to the jury's verdict as a "recommendation," and at another as "only the initial step." No objection was made by the defense at any of the foregoing points.

Following them, however, defense counsel advised the jury in his closing argument that:

The decision whether Robert Sawyer lives or dies is in your hands....

I personally do not agree with the death penalty. I don't think there is any circumstance when anyone has the right to kill another person no matter how we try to get away from it. That is what we would be doing is killing another person.... I'm going to ask you to give Robert Sawyer the living death of life imprisonment. Don't kill. Thank you.

After the prosecutor's closing argument, in which he advised the jury that it really had no choice but to recommend the death penalty, "no matter how unpleasant or how difficult this type of decision may be for you to make," the judge charged the jury in standard form, directing them to the

evidence as the basis for their decision, describing their forthcoming verdict in one place as a recommendation of sentence and at the other as the imposition of one, and concluding:

It is your responsibility in accordance with the principles of law I have instructed whether the defendant should be sentenced to death or life imprisonment. Go with Mr. Miller back in the jury room.

So much for the circumstances of how the jury was advised. We turn now to the law.

[19] The vice in the argument against which *Caldwell*'s rule is directed is not so much that it minimizes the jury's role in the capital sentencing procedure as that it minimizes it untruthfully.¹⁴ It is all too likely that a lay juror who has been told that panel after panel of judges—right up through the Supreme Court—will automatically "review" his verdict may believe that they "review" it as he decided it, in a plenary fashion. Were he told that the "review" would not at all directly concern itself with the central issue before him, life or death for the accused, he would necessarily feel far less reassurance at the prospect. Where, however, a reading of the record makes clear that the jury was told that the life-or-death decision was up to them and that execution could not be exacted without their permission, we think that *Caldwell* is satisfied.

We think it plain that this was the case as to Sawyer. Both the prosecution and the defense, as well as the trial judge, advised Sawyer's jury that if it chose life imprisonment as its verdict, that was the end of the matter. The defense implored them to do so, and the prosecution—despite various ambiguous statements indicated above—told them it was up to them: "The decision is in your hands."

In the last analysis, the fundamental question, in this as in other habeas cases involving prosecutorial remarks complained of, is whether the petitioner has demonstrated that the remarks "so infected the

at 2646.

14. See Justice O'Connor, concurring partly and separately in *Caldwell*, 472 U.S. at 341, 105 S.Ct.

trial with unfairness as to make the resulting conviction a denial of due process." *Darden*, 477 U.S. at 181, 106 S.Ct. at 2472, 91 L.Ed.2d at 187 (quoting from *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)). In a *Caldwell* situation, however, we agree with our Brethren of the Eleventh Circuit that because the prosecutor's remarks typically amount to a misinstruction to the jury on the legal effect of their verdict, the reaction to them of defense counsel and trial judge are of especial importance:

Of critical importance in *Caldwell* was the fact that the trial judge approved of the prosecutor's comments, stating that it was proper that the jury be told that its decision was automatically reviewable. See *id.*; *Caldwell v. Mississippi*, 472 U.S. at 325-26, 106 S.Ct. at 2638. Because of the trial judge's agreement with the prosecutor's comments, it was as if the jury received an erroneous instruction from the court at the sentencing phase of a capital proceeding, thus triggering the Eighth Amendment's heightened requirement of reliability in a capital case and mandating reversal.¹⁵

¹⁵ The Court in *Caldwell* noted that in *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974), the trial judge took special pains to correct the prosecutor's impropriety, giving the jury a strong curative instruction. In contrast, in *Caldwell*, the trial judge "not only failed to correct the prosecutor's remarks, but in fact openly agreed with them: he stated to the jury that the remarks were proper and necessary, strongly implying that the prosecutor's portrayal of the jury's role was correct." *Caldwell v. Mississippi*, 472 U.S. at 2645, 105 S.Ct. at 340.

Tucker, 802 F.2d at 1295.

Indeed, the only instance of reversal for a *Caldwell* violation in our Circuit to which we are cited or which our researches have located is *Wheat v. Thigpen*, 793 F.2d 621 (1986), in which the trial court approved the making of such an argument over defense counsel's objection:

Again, I say to you, and then I'll leave it to you, just remember this, if your verdict is that of the death penalty, that's not final. There's so many more people who will look at this case after you have made your decision in this case. Others will look at it, and look at your

work, and see if you've made the right decision. And I can assure you, Lady and Gentlemen, that if one finds that you have not, that they will send him back and tell us to try it over, because someone made a mistake.

BY MR. STEGAL: May It Please T Court, I'm gonna object to that again. He's telling this jury to go ahead and do something even if it's wrong, because it's wrong, they're gonna send it back. That's not right. I'm gonna object.

BY THE COURT: I think the argument was allowed—it was opened up on your argument. I'll overrule it.

793 F.2d at 628.

In so stating we do not, of course, intend to say that reversal is never appropriate the case of a *Caldwell*-type misstatement unless it has been futilely objected to or endorsed as proper or correct by the trial judge. Each case must be evaluated on its own facts and circumstances; and it is not impossible to imagine statements by a prosecutor that, even absent an objection, minimize the jury's role to such a degree as to require reversal if left uncorrected. Even in *Caldwell*, however, where the trial court had overruled an objection and in doing so expressly endorsed the prosecutor's minimizing remarks, the Supreme Court emphasized that his remarks were "quite focused, unambiguous, and strong." 472 U.S. at 340, 105 S.Ct. at 2645. And indeed they were: beginning with two accusations of duplicity on the part of the defense, the argument proceeds through an attack focused on the defense's "insinuating" that the jury's decision was final, invokes the trial judge's already-expressed approval of its somewhat misleading statements, and winds up by assuring the jurors that the decision is "automatically reviewable by the Supreme Court." By contrast, the prosecutor's vague references in today's case to "others who will be behind you and the like pale into relative insignificance."

The prosecutor in today's case indulges in no claim that the defense was disingenuous or cynically attempting to mislead the jury, as did his comparable figure in *Caldwell*. Nor did counsel raise any objection.

tion, futile or otherwise, to any of the prosecutor's remarks to which Sawyer now takes exception; and the trial court neither approved nor endorsed them. By contrast to the prosecutor's statements in *Caldwell*, which were quite focused, unambiguous and strong—trumpeting automatic review by the Supreme Court and accusing the defense of deliberately misleading the jury as to its role—these were vague and ambiguous. And although we agree with the federal district court that the prosecutor's remarks complained of were improper, we also agree that they did not constitute reversible error—error that so infected the trial as to deny due process.¹³

IV.

For the foregoing reasons, we AFFIRM.

KING, Circuit Judge, dissenting in part:

I respectfully dissent from the majority's conclusion that the prosecutor's undeniably improper remarks about the finality of the death penalty determination did not violate the eighth amendment as interpreted and applied by the Supreme Court in *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). I have several major concerns with the majority's analysis. First, by applying the fundamental fairness test of *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974), instead of the "no effect" test of *Caldwell*, the majority has reviewed the prosecutor's comments in this case under the wrong standard. Second, by holding that "a most critical factor in *Caldwell* was the trial judge's approval" of the prosecutor's remarks, the majority has adopted an

artificially narrow and incorrect interpretation of *Caldwell*—an interpretation which effectively eviscerates the holding in that case. Third, the majority has also mischaracterized the prosecutor's comments here in order to force them outside the ambit of *Caldwell*. And finally, the majority has erroneously implied that other remarks by the trial court, prosecutor and defense counsel were sufficient to cure the comments of any constitutional impropriety.

The Prosecutor's Argument

The majority opinion gives the facts of the alleged *Caldwell* violation short shrift. But I think it is important to understand exactly what the prosecutor said here. The comments at issue were made by the prosecutor in his closing argument at the sentencing phase of Sawyer's capital trial. The prosecutor, in describing the jury's role, remarked:

The law provides that if you find one of these circumstances then what you are doing as a juror, you yourself will not be sentencing Robert Sawyer to the electric chair. What you are saying to this Court, to the people of this Parish, to any appellate court, the Supreme Court of this State, the Supreme Court possibly of the United States, that you the people as a fact finding body from all the facts and evidence you have heard in relationship to this man's conduct are of the opinion that there are aggravating circumstances as defined by the statute, by the State Legislature that this is the type of crime that deserves that penalty. It is merely a recommendation so try as he may, if Mr. Weidner tells you that each and every one of you

of reversal, that any remark by a prosecutor in argument that might have a tendency to minimize the jury's sense of responsibility in a capital case had "no effect" on its sentencing decision. Such a test, for example, would make objecting a doubtful tactic, for an objection might bring a correcting instruction or one to disregard, thus removing the remark as a valid ground for appeal. Nor do we see how such a "no effect" test can lie in bed with the requirement, reiterated after *Caldwell* in *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2444, 2472, 91 L.Ed.2d 144, 157 (1986), that to obtain habeas relief on the basis of improper remarks by the prosecutor, petitioner must show that they so infected the trial as to deny due process.

13. The dissent in *Tucker* argued for a "no effect" standard for reversal, based on a conclusion of the majority in *Caldwell*. The dissent in *Caldwell* majority opinion, "Because we cannot say that this effort [to minimize the jury's sense of responsibility] had no effect on the sentencing decision, that decision does not meet the standard of reliability that the eighth amendment requires." 802 F.2d at 1296.

There is no gainsaying that the phrase appears in *Caldwell*, or that it can be read as Judge Kravitch and her two companions in dissent would read it. For a variety of reasons, however, we are not persuaded that the Court intended to impose such a well-nigh impossible burden upon the State as one to show, on pain

I hope you can live with your conscience and try and play upon your emotions, you cannot deny, it is a difficult decision. No one likes to make those [sic] type of decision but you have to realize if but for this man's actions, but for the type of life that he has decided to live, if of his own free choosing, I wouldn't be here presenting evidence and making argument to you. You wouldn't have to make the decision (emphasis supplied).

The prosecutor went on to describe the brutal nature of the crime and, briefly, its impact on the victim and her mother. Then, once again turning to the function of the jury, the prosecutor stated:

There is really not a whole lot that can be said at this point in time that hasn't already been said and done. The decision is in your hands. You are the people that are going to take the initial step and only the initial step and all you are saying to this court, to the people of this Parish, to this man, to all the Judges that are going to review this case after this day, is that you the people do not agree and will not tolerate an individual to commit such a heinous and atrocious crime to degrade such a fellow human being without the authority and the impact, the full authority and impact of the law of Louisiana. All you are saying is that this man from his actions could be prosecuted to the fullest extent of the law. No more and no less (emphasis supplied).

Finally, after arguing that a death penalty would be justified in this case, the prosecutor noted:

It's all your doing. Don't feel otherwise. Don't feel like you are the one, because it

is very easy for defense lawyers to try and make each and every one of you feel like you are pulling the switch. That is not so. It is not so and if you are wrong in your decision believe me, believe me there will be others who will be behind you to either agree with you or to say you are wrong so I ask that you do have the courage of your convictions (emphasis supplied).

Caldwell, Donnelly and Darden

In *Caldwell*, the Supreme Court held "that it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Caldwell*, 472 U.S. at 328-29, 105 S.Ct. at 2639. The Court noted that the capital sentencing scheme is premised on a "[b]elief in the truth of the assumption that sentencers treat their power to determine the appropriateness of death as an 'awesome responsibility' [which allows the] Court to view sentencer discretion as consistent with—and indeed as indispensable to—the Eighth Amendment's 'need for reliability in the determination that death is the appropriate punishment in a specific case.'" *Id.* at 330, 105 S.Ct. at 2640 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976) (plurality opinion)). The Court went on to specify a number of "specific reasons to fear substantial unreliability as well as bias in favor of death sentences when there are state induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court." *Caldwell*, 472 U.S. at 330, 105 S.Ct. at 2640.¹ Turning to

1. Initially, the Court recognized that "[b]ias against the defendant clearly stems from the institutional limits on what an appellate court can do—limits that jurors often might not understand." *Caldwell*, 472 U.S. at 330, 105 S.Ct. at 240. The Court also noted that "[e]ven when a sentencing jury is unconvinced that death is the appropriate punishment, it might nevertheless wish to 'send a message' of extreme disapproval for the defendant's acts. This desire might make the jury very receptive to the prosecutor's assurance that it can freely 'err' because the error may be corrected on appeal." *Id.* at 331, 105 S.Ct. at 2641 (quoting *Maggio v. Williams*, 464 U.S. 46, 54-55, 104 S.Ct. 311, 316, 78 L.Ed.2d 43 (1983)). A defendant could be executed, therefore, although no sentencer had ever made a determination that death was the appropriate sentence. The Court also raised the possibility that the jury, assuming that only a death sentence will be reviewed, might "understand that any decision to 'delegate' responsibility for sentencing can only be effectuated by returning that sentence." *Caldwell*, 472 U.S. at 332, 105 S.Ct. at 2641. The sentence that would emerge from such a proceeding would not represent a decision that the appropriateness of the defendant's death had been demonstrated; rather,

Williams, 464 U.S. 46, 54-55, 104 S.Ct. 311, 316, 78 L.Ed.2d 43 (1983)). A defendant could be executed, therefore, although no sentencer had ever made a determination that death was the appropriate sentence. The Court also raised the possibility that the jury, assuming that only a death sentence will be reviewed, might "understand that any decision to 'delegate' responsibility for sentencing can only be effectuated by returning that sentence." *Caldwell*, 472 U.S. at 332, 105 S.Ct. at 2641. The sentence that would emerge from such a proceeding would not represent a decision that the appropriateness of the defendant's death had been demonstrated; rather,

the facts before it, the Court concluded that the prosecutor's comments sought to give the jury a view of its role in the capital sentencing procedure that was fundamentally incompatible with the eighth amendment's heightened need for reliability. *Id.* at 340, 105 S.Ct. at 2645. As the Court "[could not] say that [the State's] effort had no effect on the sentencing decision," it was compelled to vacate the death sentence. *Id.* at 341, 105 S.Ct. at 2646.

In reaching its conclusion, the Court was careful to distinguish, on two separate grounds, the fourteenth amendment fundamental fairness inquiry of *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974), from the case before it. First, the trial judge in *Donnelly* had agreed that the prosecutor's remarks in that case were improper and had given the jury a strong curative instruction. By contrast, in *Caldwell*, the trial judge not only failed to correct the prosecutor's remarks, but in fact openly agreed with them. *Caldwell*, 472 U.S. at 339, 105 S.Ct. at 2645. Second, the prosecutor's remarks in *Donnelly* were ambiguous and did not so prejudice a specific constitutional right as to amount to a denial of that right. The remarks in *Caldwell*, in contrast, "were quite focused, unambiguous, and strong" and "were pointedly directed at the issue that [the] Court has described as 'the principal concern' of [its] jurisprudence regarding the death penalty, the procedure by which the State imposes the death sentence." *Id.* at 340, 105 S.Ct. at 2645 (citation omitted).

er, the decision would present "the specter of the imposition of death based on a factor wholly irrelevant to legitimate sentencing concerns"—namely the desire to avoid responsibility for the decision. *Id.* Finally, given the fact that a capital sentencing jury is "made up of individuals placed in a very unfamiliar situation and called on to make a difficult and uncomfortable choice," an uncorrected suggestion that the ultimate determination of death rests elsewhere presents "an intolerable danger that the jury will in fact choose to minimize the importance of its role." *Id.* at 333, 105 S.Ct. at 2642.

2. In *Darden*, the Court wrote that:
There are several factual reasons for distinguishing *Caldwell* from the present case. The comments in *Caldwell* were made at the sen-

The Court subsequently clarified the reach of *Caldwell* and *Donnelly* in *Darden v. Wainwright*, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). In *Darden*, the Court was confronted by a variety of challenges to the prosecutor's closing argument at the guilt phase of a capital murder trial. The Court relied on *Donnelly* in treating the relevant question as "whether the prosecutor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden*, 106 S.Ct. at 2472 (quoting *Donnelly*, 416 U.S. at 643, 94 S.Ct. at 1871). The *Darden* majority was quite careful, however, to distinguish the facts in front of it from those in *Caldwell*.³ The *Darden* Court specifically limited *Caldwell* "to certain types of comment—those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision." *Darden*, 106 S.Ct. at 2473 n. 15. As the prosecutor's comments in *Darden* did not mislead the jury as to its role in the sentencing decision, *Caldwell* was inapplicable.

Standard of Review

I differ with the majority on the appropriate standard by which to review the comments at issue here. The majority, relying on *Darden* and *Donnelly*, holds that the fundamental question, in this case as in other habeas cases involving improper prosecutorial comments, is whether the petitioner has demonstrated that the remarks rendered the trial fundamentally unfair so as to deny due process.⁴ A fair reading of

tencing phase of trial and were approved by the trial judge. In this case, the comments were made at the guilt-innocence stage of trial, greatly reducing the chance that they had any effect at all on sentencing. The trial judge did not approve of the comments, and several times instructed the jurors that the arguments were not evidence and that their decision was to be based only on the evidence.

Darden, 106 S.Ct. at 2473 n. 15.

3. The genesis of this proposition may be found in the Eleventh Circuit's decision in *Tucker v. Kemp*, 802 F.2d 1293 (11th Cir.1986) (en banc), cert. denied, — U.S. —, 107 S.Ct. 1359, 94 L.Ed.2d 529 (1987). In *Tucker*, the court "borrowed" the prejudice prong of *Strickland* in

Caldwell and *Darden* cannot support this conclusion.

In *Caldwell*, the Court wrote: "Because we cannot say that this effort [to minimize the jury's sense of responsibility for determining the appropriateness of death] had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires." 472 U.S. at 341, 105 S.Ct. at 2646. The majority, while recognizing that the phrase exists and that the "no effect" test is a plausible interpretation of the Court's language, concludes, for a variety of reasons, that the Court could not have meant to place a higher burden on the State in an eighth amendment *Caldwell*-type situation than would otherwise be borne under the due process jurisprudence of *Donnelly* and its progeny. I find the majority's reasoning unpersuasive.

The majority argues that the adoption of the "no effect" test would impose a "well-nigh impossible burden upon the State." According to the majority, the State would be forced to show that any remark which tended to minimize the jury's sense of responsibility in a capital case had no effect on the sentencing decision. That is not so. In order to qualify as a *Caldwell* violation, the prosecutor's remarks concerning the jury's role must be "focused, unambiguous and strong." *Id.* at 340, 105 S.Ct. at 2645. Moreover, the remarks would typically be made at the sentencing phase of trial rather

order to apply the *Donnelly* fundamental fairness standard to *Caldwell*-type violations. See *Tucker*, 802 F.2d at 1295. That decision was roundly criticized by three judges in dissent. The dissenting opinion in *Tucker* discussed a number of shortcomings in the Eleventh Circuit's approach. The dissent noted, for example, that *Strickland* and *Caldwell* are fundamentally different in their assignment of the burden of proving prejudice. *Tucker*, 802 F.2d at 1298 (dissenting opinion). Unlike *Strickland*, *Caldwell* places the prejudice burden on the State. "Once the petitioner has shown that the prosecution attempted to minimize the jury's responsibility at the capital sentencing hearing, the state must show that 'this effort had no effect on the sentencing decision.'" *Id.* (quoting *Caldwell*, 472 U.S. at 341, 105 S.Ct. at 2646). The dissent also stressed that while "the government is not responsible for, and hence not able to prevent, [defense] attorney errors that will result in reversal," see *Strickland*, 466 U.S. at 693, 104 S.Ct. at 2087, "the state can control prosecutorial

er than during voir dire, see *Byrne v. Eler*, 845 F.2d 501, 509 (5th Cir. 1988), during the guilt-innocence stage, see *Darden*, 106 S.Ct. at 2473 n. 15. Finally, remarks must not be corrected by an appropriate instruction from the trial court. *Caldwell*'s "no effect" test, therefore, limited to a subset of particularly forceful prosecutorial comments on a narrow topic generally presented to a capital jury at the sentencing phase of trial, which are not corrected by the trial court. So, while the burden on the State may in fact be "well-nigh impossible," it is borne only in a narrow class of cases.

The majority also argues that the "no effect" test cannot be squared with *Darden*'s reaffirmation of the *Donnelly* test in most cases involving improper remarks by a prosecutor. The principles of *Caldwell*, however, were not applicable in *Darden*. *Darden*, 106 S.Ct. at 2473 n. 15. Since the prosecutor's comments in *Darden* could not have misled the jury into thinking that it had a reduced role in the sentencing process, any eighth amendment argument was unconvincing and the Court felt free to apply the more generally applicable due process standard of review. *Darden* did not hold that the *Donnelly* standard should be applied to *Caldwell* violations. If it had, the Court would not have needed to go to such great lengths to distinguish *Caldwell*.⁵ See *id.* It is clear, therefore, that in

conduct and, in the capital sentencing context, is constitutionally obligated to do so." *Tucker*, 802 F.2d at 1298 (dissenting opinion). Finally, the dissent found it significant that the Supreme Court itself "did not apply its *Strickland* prejudice analysis to *Caldwell*'s claim of prosecutorial misconduct at sentencing but instead reaffirmed the long line of cases requiring heightened reliability in capital sentencing proceedings." *Id.*

4. By reviewing Justice Blackmun's dissenting opinion in *Darden*, which was joined by three of the other four members of the *Caldwell* majority, the error in the majority's analysis can be readily discerned. In *Darden*, the dissent charged that the Court rejected "the 'no effect' test set out in *Caldwell*" without identifying which standard it was using. *Darden*, 106 S.Ct. at 2480 (Blackmun, J., dissenting). The Court responded to the dissent's charges by distinguishing *Caldwell* so that it could apply the *Donnelly* standard to the facts before it. At no

the peculiar eighth amendment context of the *Caldwell* violation, a stricter standard of review applies.⁴ Prosecutorial comments which truly qualify as *Caldwell* violations cannot be reviewed under the *Donnelly* standard.⁴

Nature of a *Caldwell* Violation

I also differ with the majority's description of the nature of what has come to be called a *Caldwell* violation. Not content with *Darden*'s express limitation of *Caldwell* to a particular type of prosecutorial comment at the sentencing phase of trial, the majority would further restrict the reach of *Caldwell* to those rare instances in which the trial court expressly approves the prosecutor's improper remarks. Essentially, the majority would make the trial court's imprimatur a prerequisite to finding a *Caldwell* violation. The majority's position is based on a tortured reading of *Caldwell*.

The majority ignores the fact that the Supreme Court framed the *Caldwell* issue throughout the majority opinion solely in terms of the prosecutor's remarks:

In this case, a prosecutor urged the jury not to view itself as determining whether

point, however, did the Court take issue with the dissent's characterization of the *Caldwell* standard as a "no effect" test.

5. Justice Rehnquist, in his dissenting opinion in *Caldwell*, clearly believed that the Court had rejected the *Donnelly* standard. Justice Rehnquist "[found] unconvincing the Court's scramble to identify an independent Eighth Amendment norm that was violated by the [prosecutor's] statements," and concluded that "[a]lthough the Eighth Amendment requires certain processes designed to prevent the arbitrary imposition of capital punishment, it does not follow that every proceeding that strays from the optimum is *ipso facto* constitutionally unreliable." *Caldwell*, 472 U.S. at 350-51, 105 S.Ct. at 2650-51 (Rehnquist, J., dissenting). Justice Rehnquist chided the Court for not heeding the directives of *Donnelly* and for not applying a fundamental fairness test. *Id.*

6. The panel's discussion of *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), and *Rose v. Clark*, 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986), underscores the error in the majority's adoption of a fundamental fairness standard in this case. In *Chapman*, the Court recognized that some errors necessarily render a trial fundamentally unfair. *Rose*,

the defendant would die, because a death sentence would be reviewed for correctness by the State Supreme Court. We granted certiorari . . . to consider petitioner's contention that the prosecutor's argument rendered the capital sentencing proceeding inconsistent with the Eighth Amendment's 'heightened need for reliability. . . .'

Caldwell, 472 U.S. at 323, 105 S.Ct. at 2636 (emphasis supplied). The majority opinion in *Caldwell* is divided into approximately thirteen parts and subparts, and the only mention of the trial court's endorsement of the prosecutor's remarks is in Part IV-C of the opinion in which the Court sought to distinguish *Donnelly*. While the Court did note that the trial judge had approved the remarks in the case before it, it did not establish that fact as a prerequisite to its ultimate condemnation of the prosecutor's actions. Rather, the Court identified two important factors which distinguished *Donnelly*. First, the Court looked at the trial court's actions and found that, unlike in *Donnelly*, the trial court not only failed to correct the improper remarks, it also endorsed them. *Id.* at 339, 105 S.Ct. at 2645. Next, the Court looked to the character of

106 S.Ct. at 3106. There are certain constitutional protections so basic to a fair trial that without them, a criminal proceeding cannot reliably serve its function as a vehicle for the determination of guilt or innocence, and the criminal sanction may not be regarded as fundamentally fair. *Id.* Such errors either abort the basic trial process or deny it altogether. *Id.* at n. 6. The *Caldwell* violation presents a clear example of a breakdown in the trial process. The pernicious effects of focused, unambiguous and strong prosecutorial remarks concerning the jury's role in the sentencing process and the inevitability of appellate review are impossible to measure. Consequently, where such remarks are left uncorrected by the trial court, there is an intolerable danger that they affected the sentencing decision. For all the reasons reviewed by the Court in *Caldwell*, such remarks create an unacceptable risk of systemic breakdown, thereby poisoning the reliability of the death sentence. Given that the eighth amendment demands a heightened degree of reliability in any case where the State seeks to take the life of a defendant, the prosecutor's remarks necessarily rendered the proceedings fundamentally unfair. It is our inability to measure the effect of such remarks, combined with the very grave threat to the integrity of the proceedings posed by such remarks, that militates in favor of the "no effect" test.

the remarks and determined that the prosecutor's comments differed from those in *Donnelly* because they were "focused, unambiguous, and strong" and because they prejudiced a specific constitutional right, i.e., an eighth amendment right. *Id.* at 340-41, 105 S.Ct. at 2645-46. The Court went on to confirm that such comments, if left uncorrected, might so affect the fundamental fairness of the sentencing proceeding as to violate the eighth amendment. *Id.*

Given *Caldwell*'s overwhelming emphasis on the character and effect of the prosecutor's argument itself,⁷ the question of whether the trial court endorsed the comments must be viewed as merely a factor in a larger inquiry. A proper inquiry must focus on the nature of the prosecutor's remarks themselves and on the character of the trial court's response to those remarks. Moreover, an evaluation of the trial court's response is not limited to the question of whether the trial court endorsed the remarks. Were this not the case, the Court's references to curative action would be superfluous for silence would be sufficient medicine for what ailed the proceedings. I do not think *Caldwell* can fairly be read, therefore, as holding that the trial court's endorsement of the prose-

cutor's remarks is a prerequisite to an eighth amendment violation. *Nature of the Prosecutor's Remarks*

The majority, casting the prosecutor's remarks in a more favorable light than merit, weaves the threads of an "improper" argument into a hazy story of vague, disjointed and foolish prosecutorial comments. My own reading of the record has led me to conclude that the prosecutor's remarks in this case are sufficiently similar to those constitutionally wanting in *Caldwell* to merit vacation of Sawyer's sentence.

In the instant case, the prosecutor urged the jury:

Don't feel like you are the one, because it is very easy for defense lawyers to make each and every one of you feel like you are pulling the switch. It is not so and if you believe me, there will be others who will tell you to either agree with you or you are wrong. . . .

While the majority is arguably dismissing the first portion of the argument as a permissible "joint-response" argument, it is remiss in not reaching the answer to the query it asks

of the heightened need for reliability by the eighth amendment of sentencing in capital trials.

The prosecutor is free to emphasize the nature of the jury decision. He is to emphasize that the defendant himself bears the responsibility for the consequences of his actions. The prosecutor must certainly not free, however, to diminish the jury's role in the decision by alluding to the specter of appellate review. If, by doing so, the prosecutor may well lead jurors with the notion that their moment in favor of death will be revisited. See *Caldwell*, 472 U.S. at 340 S.Ct. at 2645 n. 7. This may hold true when the prosecutor has stressed that "the decision" is in the jury's hands for "the decision" that case would be the decision to sentence, or the decision to start the ball rolling, or the decision that the jury wants the defendant to live. See *id.* at 330-33, 105 S.Ct. at 2636-37. It would not be the decision demanded by the eighth amendment and required by the eighth amendment that the defendant merits execution because the appropriate punishment for the crime has committed.

7. Justice O'Connor, in her concurring opinion, noted that "the prosecutor's remarks were impermissible because they were inaccurate and misleading in a manner that diminished the jury's sense of responsibility." *Id.* at 342, 105 S.Ct. at 2646 (O'Connor, J., concurring). Justice O'Connor's concurring opinion focused exclusively on the prosecutor's remarks, never once mentioning the trial court's endorsement of those remarks.

8. The majority also strives to justify the prosecutor's remarks on the ground of practical necessity. Prosecutors need such arguments, the majority suggests, to deal with the "formidable" argument, typically urged as a "last-resort" by struggling defense counsel, that the decision whether the defendant merits execution rests with each individual juror, that human judgment is not infallible, that mistakes can be made and that death is one error which cannot be corrected. The majority points out, as it must, that such arguments are "in varying degrees" true. Those weighty factors, however, are precisely the sort of considerations which society has entrusted the jury to weigh in reaching its decision. Those decisions are at the core

spect to the latter portion: who are the "others" who will be behind the jury to agree with their decision or correct them if they are wrong? The answer is suggested in an earlier comment by the prosecutor:

... what you are doing as a juror, you yourself will not be sentencing Robert Sawyer to the electric chair. What you are saying to this Court, to the people of this Parish, to any appellate court, the Supreme Court of this State, the Supreme Court possibly of the United States, that you the people as a fact finding body ... are of the opinion that there are aggravating circumstances as defined by the statute, by the State Legislature that this is the type of crime that deserves that penalty.

Just as the *Caldwell* prosecutor referred to the ultimate reviewability of the jury's determination, so too did the prosecutor here make several unambiguous allusions to the inevitability of appellate scrutiny, naming the potential reviewers as he did so. As if the intended suggestion was not already clear enough, the prosecutor went on to hammer home his point by explicitly referring to judicial review and by couching his description of the jury's decision in language bespeaking possibility rather than finality:

You are the people that are going to take the initial step and only the initial step and all you are saying to this court, to the people of this Parish, to this man, to all the Judges that are going to review this case after this day.... All you are saying is that this man from his actions could be prosecuted to the fullest extent of the law. No more and no less.

The contested remarks here are precisely the sort of comments condemned in *Caldwell* as tending to impart to the jury a view of its role in the capital sentencing procedure that is fundamentally incompatible with the eighth amendment's heightened need for reliability in the death sentence determination. It is unnecessary to decide whether any one remark violated *Caldwell* for it is readily apparent that the prosecu-

9. The majority, in an effort to bolster its position that the prosecutor's remarks were later

tor's repeated references to appellate review and the jury's limited role in the death sentence calculus surely did so. When viewed in their totality, the remarks appear "focused, unambiguous, and strong." See *Caldwell*, 472 U.S. at 340, 105 S.Ct. at 2645. The prosecutor clearly sought to leave the jury with the notion that their recommendation of death would be merely "the initial step" and that the "others who will be behind" them would be there to correct any error in that determination. The message of non-finality was clear.

The Trial Court's Response

Having determined that the prosecutor's remarks were inappropriate under *Caldwell*, a question remains whether subsequent action by the trial court was sufficient to preclude reversal. See *Caldwell*, 472 U.S. at 339-40, 105 S.Ct. at 2645; see also *Bell v. Lynaugh*, 828 F.2d 1085 (5th Cir.), cert. denied, — U.S. —, 108 S.Ct. 310, 98 L.Ed.2d 268 (1987). The majority notes that the trial court delivered a standard form jury instruction informing the jury that it was their responsibility to deliver a sentence of death or life imprisonment. While that much is true, it is equally clear that the trial court did little if anything to correct the damage that was done. This is particularly so with respect to the prosecutor's comments regarding appellate review. Even if the trial court's instructions left the jury with the view that they had an important role to play, they did nothing to undermine the prosecutor's suggestion that the jury's determination would be reviewed by an appellate court to assure its correctness. See *Caldwell*, 472 U.S. at 340 n. 7, 105 S.Ct. at 2645 n. 7.

This is not a case where the trial court admonished the jury to disregard the prosecutor's comments. Nor is this a case where the trial court meticulously instructed the jury on the errors in the prosecutor's argument. I do not presume to establish a general standard by which to judge the efficacy of a trial court's curative instructions in a *Caldwell* violation context. I merely note that in the instant case, the trial court's instructions⁹ were insufficient

"cured", points to the fact that defense counsel informed the jury that "[t]he decision whether

to disabuse the jury of the notion that final responsibility for the sentencing decision might lay elsewhere.

In summary, because I believe that the prosecutor's effort to minimize the jury's sense of responsibility for determining the appropriateness of death cannot be said to have had no effect on the sentencing decision, I believe that the writ must be granted as to the sentence imposed upon Sawyer. I dissent from the majority's decision to affirm the district court's denial of the writ.

ON SUGGESTION FOR REHEARING EN BANC

Before CLARK, Chief Judge, GEE, RUBIN, REAVLEY, POLITZ, KING, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, and SMITH, Circuit Judges.

BY THE COURT:

A member of the Court in active service having requested a poll on the suggestion for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that this cause shall be reheard by the Court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.



Robert Sawyer lives or dies is in your hands." That remark was patently insufficient to relieve the jurors of any mistaken impressions they might have held as to their role in the death penalty determination. In fact, any initial confusion by the jury might well have been exacerbated by defense counsel's espousal of a position contrary to that which the prosecutor seemed to embrace. The jury may have understood the remark, made just after the prosecutor

Zachary ROGERS, Petitioner-Appellee,

James A. LYNAUGH, Director, Texas Department of Corrections, Respondent-Appellant.

No. 87-6011.

United States Court of Appeals, Fifth Circuit.

June 30, 1988.

State prisoner petitioned for writ of habeas corpus. The United States District Court for the Eastern District of Texas, Robert M. Parker, J., granted the writ, and state appealed. The Court of Appeals, Johnson, Circuit Judge, held that state committed constitutional error in closing argument to jury during sentencing phase of trial, and error was not harmless.

Affirmed.

1. Constitutional Law §268(8)

Prosecutorial statements may violate due process in two ways; statements may implicate a specific provision of the Bill of Rights incorporated into the Fourteenth Amendment by the due process clause; if statements do not implicate any such incorporated constitutional right, they may constitute a denial of due process generally, sometimes called a "generic substantive due process" violation. U.S.C.A. Const. Amend. 14.

2. Constitutional Law §268(8)

In case of an asserted "generic due process" violation in a prosecutorial statement, court asks whether prosecutor's comments so infected trial with unfairness as to make a resulting conviction or sentence a denial of due process; under the test, although the asserted misconduct may have made the defendant's trial less than

had finished insinuating that the jury's decision was not final, to signify the existence of a true dispute on the role of the jury. Therefore, defense counsel's remark, when considered along with the prosecutor's earlier comments, may well have added to the cloud of uncertainty billowing around the jury about its own role. Consequently, the majority's reliance on the curative properties of defense counsel's remark is misplaced.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

APR 9 8 38 AM '87

LOUISIANA WHITE
CLERK

ROBERT SAWYER

CIVIL ACTION

VERSUS

NUMBER: 86-223

FRANK BLACKBURN, WARDEN

SECTION: "I" (4)

ORDER

The Court, after considering the petition, the record, the law applicable to the case, and the Magistrate's Finding and Recommendation, hereby approves the Magistrate's Finding and Recommendation and adopts it as its opinion, with the comments and corrections noted herein.

In view of the serious nature of the petitioner's allegations pertaining to the trial court's appointment of counsel with less than five years experience in violation of Article 512 of the Louisiana Code of Criminal Procedure, the Court makes the following additional comments:

The petitioner contends that the trial court's noncompliance with Article 512 of the Louisiana Code of Criminal Procedure deprived him of equal protection of the laws and due process of law in violation of the Fourteenth Amendment to the Constitution. We find it unnecessary to reach the merits of the petitioner's equal protection and due process claims, because even if the trial court's appointment of counsel with less than five years experience violated the petitioner's Fourteenth Amendment rights, the record reveals that the error was harmless beyond a reasonable doubt. Because we assume for argument's sake that an error was committed, we must now engage in a two-part analysis: (1) Can this type of error ever be treated as harmless, and (2) if so, was the violation harmless in this case.

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Discussing the purpose and the application of the federal harmless error rule, the United States Supreme Court in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), noted: "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." Chapman, 386 U.S. at 23. The Chapman court gave examples of such "basic" constitutional rights: the right to counsel, Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); the right to be tried by an impartial judge, Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927); and the right to have coerced confessions deemed inadmissible at trial, Payne v. Arkansas, 356 U.S. 560, 78 S.Ct. 844, 2 L.Ed.2d 975 (1958). By contrast, there are other constitutional errors "which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless" Chapman, 386 U.S. at 22.

The petitioner contends that the trial court's appointment of counsel with less than five years experience violated one of his "basic" constitutional rights therefore making a harmless error inquiry improper. Furthermore, the petitioner asserts that the harmless error principle can never be applied to due process or equal protection claims. We find no merit in petitioner's arguments. A due process or equal protection error, like most other constitutional errors, can be held harmless. See Cancler v. Maggio, 550 F.2d 1034 (5th Cir. 1977); Hills v. Henderson, 529 F.2d 397, 401-02 n.8 (5th Cir. 1976). The only time a harmless error inquiry is not appropriate is when the constitutional right violated is included in Chapman's "so basic to a fair trial" category. Any right to five-year counsel in a capital case is not included in this category.

Our next inquiry is whether the trial court's appointment of counsel with less than five years experience constitutes harmless error in this

case. The Chapman court pronounced that an error is not harmless where there is a "reasonable possibility" that the error complained of "might have contributed to the conviction". Chapman, 386 U.S. at 23 (quoting Fahy v. Connecticut, 375 U.S. 85, 84 S.Ct. 229, 11 L.Ed.2d 171 (1963)). The Court placed the burden upon the state to prove that the error was harmless. Chapman, 386 U.S. at 24. Although the Supreme Court continues to rely upon Chapman in its harmless error decisions, the Court has shifted its inquiry from whether the error "might have contributed to the conviction" to whether there was overwhelming independent evidence of guilt. Under the revised test, an error is harmless where, absent the error, the evidence was so overwhelming as to establish the guilt of the accused beyond a reasonable doubt. United States v. Hastings, 461 U.S. 499, 512, 103 S.Ct. 1974, 1982, 76 L.Ed.2d 96, 108 (1983); Brown v. United States, 411 U.S. 223, 230-32, 93 S.Ct. 1565, 1569-70, 36 L.Ed.2d 208, 215 (1973); Milton v. Wainwright, 407 U.S. 371, 377-78, 92 S.Ct. 2174, 2177-78, 33 L.Ed.2d 1, 6-7 (1972); Harrington v. California, 395 U.S. 250, 254, 89 S.Ct. 1726, 1728, 23 L.Ed.2d 284, 288 (1969). This overwhelming independent evidence test is consistent with the purpose of the harmless error rule as stated in Chapman -- to "block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial." 386 U.S. at 22. Moreover, the United States Fifth Circuit has recognized the overwhelming independent evidence test as the proper harmless error standard. Germany v. Estelle, 639 F.2d 1301 (1981), Harryman v. Estelle, 616 F.2d 870 (1980).

After examining the record, and the effect of the trial court's noncompliance with Article 512 in this particular case, we conclude that

ny error committed by the trial court in not appointing five-year counsel was harmless beyond a reasonable doubt.

In light of the recent United States Supreme Court ruling in Lockhart v. McCree, 476 U.S. ___, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986) which addressed the same issue as that raised by Mr. Sawyer in ground ten of his application for habeas corpus relief, we find it necessary to comment upon the effect of that decision in the case at hand.

The petitioner has alleged that the state trial court's removal of a juror who expressed opposition to the death penalty deprived him of the right to have his guilt or innocence determined by a jury composed of a representative cross section of the community as guaranteed by the Sixth, Eighth and Fourteenth Amendments to the Constitution. In January of 1986, this Court stayed the execution of the petitioner pending a ruling on the same issue by the United States Supreme Court in Lockhart v. McCree. The Supreme Court rendered its decision on May 5, 1986. The Lockhart court held that the removal of prospective jurors whose opposition to the death penalty is so strong that it would prevent or substantially impair the performance of their duties as jurors does not violate the requirement that a jury must represent a fair cross section of the community.

After carefully reviewing the record and transcript in this case, we conclude that the petitioner's claim is without merit. The record supports the state trial court's determination that the juror's opposition to the death penalty would have prevented her from properly and impartially applying the law to the facts, thereby substantially impairing the performance of her duties as juror.

The Court makes the following corrections to the Magistrate's Finding and Recommendation:

Page 1, lines 15-16: the citation should read "Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983)".

Page 6, lines 18: "even" should read "ever".

Page 7, line 31: "grounds" should read "ground".

Page 11, footnote 4, line 4: the citation should read: "Coco v. Winston Industries, Inc., 341 So.2d 332, 335 n.1 (La. 1976)".

Page 14, line 5: the citation should read "McCrae v. Blackburn, 793 F.2d 684, 688 (5th Cir. 1986)".

Page 14, line 6: "more" should read "less".

Page 24, line 9: "of itself" should read "in itself".

Page 30, line 18: "[d]oes" should read "does".

Page 30, line 20: the citation should read "28 U.S.C. §2254".

Page 34, line 37: "merely" should read "nearly".

Page 35, line 25: "the" should read "this".

Page 37, line 24: "the" should read "that".

Page 39, line 15: a comma should follow "specific intent".

Page 42, footnote 8, line 10: "inapposit" should read "inapposite".

Page 44, lines 15-16: the citation should read "Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985)".

Page 45, line 9: "constitutinal" should read "constitutional".

Page 45, footnote 9, line 6: "[a]dequately" should read "adequately".

Page 45, footnote 9, line 8: "offenses" should read "offenders".

Page 46, line 14: the citation should read "Sawyer v. State, 442 So.2d 1136 at 1139-40".

Page 49, line 5: "[t]he" should read "the".

Accordingly,

IT IS ORDERED that the application filed on behalf of petitioner, Robert Sawyer, is hereby DENIED.

IT IS FURTHER ORDERED that the stay of execution entered by this Court on January 21, 1986 is hereby RESCINDED.

New Orleans, Louisiana, this 8th day of April, 1987.

Henry A. Mentz
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ROBERT SAWYER
VERSUS
FRANK BLACKBURN, WARDEN

CIVIL ACTION
NUMBER: 86-223
SECTION: "I" (4)

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LURETTA G. WHITE
CLERK

J U D G M E N T

For the reasons of the Court on file herein, accordingly:

IT IS ORDERED, ADJUDGED, and DECREED that there be judgment in favor of the defendant, Frank Blackburn, Warden, and against the petitioner, Robert Sawyer, dismissing the petitioner's application for a writ of habeas corpus.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the stay of execution entered by this Court on January 21, 1986 be and is hereby RESCINDED.

New Orleans, Louisiana, this 9th day of April, 1987.

Henry A. Mentz v.
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ROBERT SAWYER
versus
FRANK BLACKBURN, WARDEN

CIVIL ACTION
NUMBER 86-223
SECTION "I" (4)

FINDING AND RECOMMENDATION

On January 21, 1986, this matter was referred to the United States Magistrate for the purpose of conducting a hearing, including an evidentiary hearing, if necessary, and submission of proposed findings and recommendations for disposition pursuant to 28 U.S.C. §636(b)(1)(B) and (C) and, as applicable, Rule 8(b) of the Rules Governing Section 2254 Cases.

Robert Sawyer is a state prisoner incarcerated in the Louisiana State Penitentiary, Angola, Louisiana. He was convicted on September 19, 1980 of First Degree Murder after trial by jury in the Twenty-Fourth Judicial District Court for the Parish of Jefferson, State of Louisiana. The jury recommended that petitioner be sentenced to death.

Petitioner's conviction and sentence was affirmed on appeal. State v. Sawyer, 422 So.2d 95 (La. 1982). Upon application for certiorari to the United States Supreme Court, the case was remanded for consideration in light of the holding in Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 335 (1983); See Sawyer v. Louisiana, 463 U.S. 1223, 103 S.Ct. 3567, 77 L.Ed.2d 1407 (1983). Upon remand, the Louisiana Supreme Court again affirmed the death sentence.

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Sawyer v. Louisiana, 442 So.2d 1136 (La. 1983). The United States Supreme Court denied a subsequent application for certiorari. 466 U.S. 931, 104 S.Ct. 1719, 80 L.Ed.2d 191 (1984).

Petitioner was represented at the trial court level by James S. Weidner, Jr., Esquire, and by Samuel Stephens, Esquire. He was represented on his direct appeal by David Katner, Esquire, and by George Escher, Esquire.

In his application for habeas corpus relief under 28 U.S.C. §2254, petitioner alleges a violation of the Constitution and laws of the United States as follows:

1. "The death-qualification of petitioner's guilt-phase jury was illegal and unconstitutional."
2. "Petitioner was denied the right of effective assistance of counsel in violation of his rights of equal protection and due process under the Sixth, Eighth and Fourteenth Amendments of the Constitution of the United States."
3. "Petitioner received ineffective assistance of counsel from his court appointed attorney in violation of his rights under the Sixth, Eighth and Fourteenth Amendments of the Constitution of the United States."
4. "Prosecutorial misconduct during closing argument in the penalty phase of the trial rendered petitioner's trial fundamentally unfair in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments of the Constitution and Article 1, Section 2, 3 and 13 of the Louisiana Constitution of 1974."
5. "Petitioner was denied his right to a fair sentencing under the Eighth and Fourteenth Amendments of the United States Constitution and under the Louisiana Constitution, because the prosecutor injected an arbitrary factor into the jurors' deliberations by explicitly misleading them concerning their role as final judges in imposing the death sentence."

6. "Petitioner was denied his Fifth and Fourteenth Amendment rights guaranteed by the United States Constitution and his right under Art. 1, Section 16 of the Louisiana Constitution of 1974 to decide for himself whether or not he would testify at trial."
7. "The trial court did not instruct the jury during the guilt/innocence phase of petitioner's trial that the defendant is not required to testify and that no presumption of guilt may be raised, thereby violating petitioner's rights guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and the laws and Constitution of the State of Louisiana."
8. "The trial court's instruction to the jury at the guilt/innocence phase of his trial improperly relieved the State of its burden of proof beyond a reasonable doubt that petitioner had the specific intent to kill or inflict great bodily harm, an essential element of the crime of first degree murder, in violation of petitioner's rights under the laws and Constitution of the State of Louisiana and the Sixth, Eighth and Fourteenth Amendments of the United States Constitution."
9. "The trial court's instructions to the jury at the guilt/innocence phase of petitioner's trial improperly relieved the State of its burden of proof beyond a reasonable doubt that petitioner had the specific intent to kill or inflict great bodily harm, an essential element of the crime of first degree murder, in violation of petitioner's rights under the laws and Constitution of the State of Louisiana and the Sixth, Eighth and Fourteenth Amendments of the United States Constitution."
10. "The trial court excused jurors, who expressed only general opposition to the death penalty, depriving petitioner of the right of a jury composed of a representative cross section of the community as guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the laws and Constitution of the State of Louisiana and the standards set in Witherspoon v. Illinois, 391 U.S. 510 (1968)."

11. "The imposition of a death sentence where one of the aggravating circumstances is not supported by the evidence violates the Eighth and Fourteenth Amendments."
12. "Petitioner's Fifth, Sixth, Eighth and Fourteenth Amendment rights were violated by the introduction of inadmissible evidence that defense counsel had no effective opportunity to rebut during the capital sentencing hearing said evidence injected on arbitrary factor into the sentencing hearing."
13. "Petitioner's sentence is excessive and disproportionate."
14. "Petitioner's sentence is arbitrary and capricious."
15. "Electrocution is a cruel and unusual means of punishment."
16. "Petitioner's sentence is invidiously discriminatory."
17. "Capital punishment is an excessive penalty."
18. "The cumulative effect of violations of petitioner's rights is in itself a violation of petitioner's constitutional rights."

These grounds¹ were presented in an application for post-conviction relief to the state trial court. An evidentiary hearing was conducted by the trial court before denying petitioner's application.

Petitioner applied for writs of certiorari and review with the Louisiana Supreme Court of the trial court's denial of his application. The Louisiana Supreme Court denied petitioner's application without comment. *Sawyer v. Maggio*, 479 So.2d 360 (La. 1985).

¹Grounds 4, 11 and 12 additionally were presented to the Louisiana Supreme Court in petitioner's appeal of his conviction.

Application for reconsideration was denied. 480 So.2d 313 (La. 1985).

The duplicate record of the Louisiana Supreme Court is before this Court. This record is sufficient for the purpose of adjudication of petitioner's claim and a federal evidentiary hearing is not necessary. 28 U.S.C. §2254(b); *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963).

We adopt the following statement of facts which are set forth in the opinion of the Supreme Court of Louisiana, recounting the events which led to petitioner being charged with murder.

"A series of bizarre and frightful events, which led to the death of Fran Arwood, occurred at the residence where defendant was living with Cynthia Shano and Ms. Shano's two young sons. Ms. Arwood was divorced from Ms. Shano's stepbrother, but remained friendly with her and often helped her by taking care of the children. Defendant had lived with Ms. Shano in Texas for several months and had professed an intention to marry her.

On September 28, 1979, Ms. Arwood was staying with Ms. Shano and helping with the children while Ms. Shano's mother was in the hospital. Defendant and Ms. Shano went out for the evening. Defendant returned at about 7:00 o'clock the next morning with Charles Lane, whom defendant had apparently met in a barroom and had invited to the residence for more drinking and talking.

Defendant and Lane continued their drinking while listening to records. At some time during the morning, Ms. Shano left to check on her hospitalized mother. When she returned, she noticed that Ms. Arwood was bleeding from her mouth. Defendant told Ms. Shano that he had struck Ms. Arwood after an argument in which he accused Ms. Arwood of giving some pills to one of the children.

The reasons behind the events that followed are difficult to discern accurately from the record and more difficult to comprehend. However, defendant does not vigorously contest the fact that Ms. Arwood in his presence was beaten, scalded with boiling water and burned with lighter fluid, or that the ferocity of the attack and the severity of the injuries caused her to die several weeks later without ever regaining consciousness.

After the original altercation during Ms. Shano's absence, defendant and Lane, for some unexplained reason, decided that Ms. Arwood needed a bath. When she resisted, defendant struck her in the face with his fist, and both men pummeled her with repeated blows. Ms. Shano objected, but defendant locked the front door and retained the key, threatening to harm Ms. Shano if she interfered or even revealed the incident.

Acting in concert, defendant and Lane dragged Ms. Arwood by the hair to the bathroom, stripped her naked, and literally kicked her into the bathtub, where she was subjected to dunking, scalding with hot water, and additional beatings with their fists. A final effort by Ms. Arwood to resist the sadistic actions of her tormentors resulted in defendant's kicking her in the chest, causing her head to strike either the tub or an adjacent windowsill with such force as to render her unconscious. Although she did not regain consciousness, defendant and Lane continued to use her body as the object of their brutality.

Defendant and Lane dragged her from the bathroom into the living room, where they dropped her, face down, onto the floor. Defendant then beat her with a belt as she lay on the floor, while Lane kicked her. They then placed her on her back on a sofa bed in the living room. As Ms. Shano went to the bathroom, she overheard defendant say to Lane that he (defendant) would show Lane 'just how cruel he (defendant) could be'. When she reentered the living room, she was struck by the pungent smell of burning flesh. She then discovered that defendant

had poured lighter fluid on Ms. Arwood's body (particularly on her torso and genital area) and had set the lighter fluid afire.

Then, displaying a callous disregard for the helpless (and mortally injured) victim, defendant and Lane continued to lounge about the residence listening to records and discussing the disposition of Ms. Arwood's body. Lane fell asleep next to the beaten and swollen body of the victim.

Shortly after noon, Ms. Shano's sister and nephew came to visit. When the nephew knocked insistently, defendant gave Ms. Shano the key to open the door, and she ran screaming to the safety of her relatives. Her excited ravings ('They've killed Fran and they're trying to kill me') were incomprehensible to her nephew and sister until they looked inside and saw the gruesome scene and Ms. Arwood's beaten and blistered body. They also saw defendant sitting with his feet propped up on the edge of the couch.

In the meantime, Ms. Shano called for police and emergency units. When the authorities arrived, they took Lane and defendant to jail, and rushed Ms. Arwood to a hospital, where she subsequently died." [Footnotes omitted]. State v. Sawyer, 422 So.2d 95, 97-98 (La. 1982).

1. The Death Qualification of Petitioner's Guilt-Phase Jury Was Illegal and Unconstitutional

Petitioner claims that he was denied his right to a fair trial under the Sixth, Eighth and Fourteenth Amendments because a qualified group of venire persons were excluded from both the penalty phase and the guilt phase of his trial on the grounds that they were opposed to the death penalty.

This issue is without merit, having been foreclosed by the Supreme Court's recent decision in *Lockhart v. McCree*, ___ U.S. ___, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986); See *Brogdon v. Blackburn*, 790 F.2d 1164 (5th Cir. 1986).

2. Ineffective Assistance of Counsel

Petitioner raises claims of ineffective assistance of counsel in grounds two and three of his application. Since the claims in both grounds are related, we will treat both claims together.

Petitioner first contends that he was denied the effective assistance of counsel by the failure of the state trial court to appoint an attorney with at least five years of experience to represent him.

Petitioner, an indigent, was entitled to court-appointed counsel. He was originally represented by Wiley Beevers who had been admitted to practice in Louisiana for over five years. Mr. Beevers, after reaching irreconcilable differences,² with petitioner was allowed to withdraw as counsel. The state trial court appointed James Weidner, Jr. to represent petitioner. Mr. Weidner advised the court that he had not been admitted to practice for five years but was told to associate counsel with the required number of years of experience.

Mr. Weidner, at the time of petitioner's trial, had been admitted to the practice of law approximately four years. Mr. Weidner attempted, but was unsuccessful in securing an attorney to assist

²Mr. Beevers testified during the state's evidentiary hearing that the irreconcilable differences consisted of petitioner refusing to follow his advice to enter a plea of guilty to second degree murder or first degree murder without capital punishment. (R., Evidentiary Hearing, July 12, 1985, p. 16). Had petitioner accepted the offer of a plea agreement, he could only have received a sentence of life imprisonment. LSA R.S. 14:30.1.

him at trial. (R., Tr., Evidentiary Hearing, July 12, 1985, p. 120). He was successful, however, in engaging Samuel B. Stephens to assist him with petitioner's case.³ At the time of trial, Mr. Stephens was just a few weeks shy of having been admitted to practice five years. (R., Petitioner's State Exhibit Z).

Louisiana law provides:

"When a defendant charged with a capital offense appears for arraignment without counsel, the court shall provide counsel for his defense in accordance with the provisions of R.S. 15:145. Such counsel must be assigned before the defendant pleads to the indictment, but may be assigned earlier. Counsel assigned in a capital case must have been admitted to the bar for at least five years. An attorney with less experience may be assigned as assistant counsel." Louisiana Code of Criminal Procedure (La. C.Cr.P. Art. 512).

Although it may be necessary to consider the performance by Messrs. Weidner and Stephens in connection with the above claim, the issue raised by petitioner is not an ineffective assistance of counsel claim, but essentially a denial of equal protection.

The state trial judge, after an evidentiary hearing, concluded that noncompliance with the directive of Article 512 is not fatal to a capital conviction when a defendant actually receives effective assistance of counsel.

³Mr. Weidner also secured the services of John Tooley, an attorney with over twenty-eight years experience, to assist him in pre-trial hearings.

The trial judge for reasons orally assigned held:

"The man [Weidner] did not only the best he could, but on reflection he did very good. I said in earlier reasons if the Court would like me to comment, the Supreme Court, on the five year rule, I served in the legislature for ten years. I know a little something about the legislative intent of these matters. And it's my opinion, I didn't draft, or was part of this particular five year rule, but it's my opinion that it's there as a floor. In other words, we have to have some criteria, a minimum shall be to insure that people out there are able to defend, or function in this particular case properly; that we say 'You have to have been in business at least five years.'

When we find that in truth and in fact someone meets specific criteria of ability and knowledge and dedication and understanding, then this artificial, if you will, floor, or criteria must give way to reality." (R., Tr., Evidentiary Hearing, July 12, 1985, p. 190).

Prior to the Louisiana Supreme Court's remand with directions to conduct an evidentiary hearing, the state trial court issued written reasons substantially identical to those above in its initial denial of petitioner's application. (R., Reasons for Judgment, February 8, 1985, pp. 2-3).

At the conclusion of the evidentiary hearing conducted on July 12, 1985, the state trial judge denied petitioner's application for post-conviction relief on the above, as well as other grounds raised.

The Louisiana Supreme Court denied, without comment, petitioner's application for certiorari and review of the trial court's ruling.

The requirement that an attorney possess a minimum of five years experience before he can be appointed to represent a defendant charged with a capital crime is a requirement of state law.

While we are bound by determinations of state law by courts of that state, *Avery v. Alabama*, 308 U.S. 444, 60 S.Ct. 321, 84 L.Ed. 377 (1940); *Garner v. Louisiana*, 368 U.S. 157, 82 S.Ct. 248, 7 L.Ed.2d 207 (1961); *Willeford v. Estelle*, 538 F.2d 1194 (5th Cir. 1976); *Hall v. Wainwright*, 493 F.2d 37 (5th Cir. 1974), we are unable to locate any other case in which the highest court of Louisiana has given the same interpretation to Article 512 as did the state trial court herein.⁴

The state trial court in its written reasons of February 8, 1985 concluded that petitioner's due process and equal protection rights were not violated by the failure of the court to appoint him an attorney with five or more years experience. (R., Reasons for Judgment, supra, p. 5). We do not have to reach the issue of whether petitioner's due process or equal protection rights were violated since any alleged breach of those rights was harmless beyond a reasonable doubt and, consequently, does not raise a federal constitutional question. *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

The state trial court concluded in its assigned oral reasons that petitioner received effective assistance of counsel. The trial judge found, "[in Mr. Weidner] ...we had a mature and reasoned

⁴The refusal of the Louisiana Supreme Court to grant writs in the case *sub judice* does not constitute a ruling on the merits. See *State v. Guillot*, 353 So.2d 1005, 1007 n.1 (La. 1977); *Coco v. Winston Industries, Inc.*, 341 So.2d 332, 335 n.1 (La. 1977). The Louisiana Supreme Court appeared to take the same approach taken by the state trial court herein in determining whether the dictates of Article 512 were violated in *State v. Motton*, 395 So.2d 1337, 1342 (La. 1981), cert. denied, 454 U.S. 850, 102 S.Ct. 289, 70 L.Ed.2d 139 (1981), when it held, on a record silent as to the length of time of practice of an appointed attorney, that the defendant failed to establish prejudice.

and in some ways seasoned certainly beyond his physical, years, for the defense of this gentleman."⁵ (R., Evidentiary Hearing, July 12, 1985, p. 187).

A review of the state record convinces us that petitioner received the effective assistance of counsel in Mr. Weidner's representation.

The only prejudice that petitioner seeks to establish is not having been represented by counsel with at least five years experience is the alleged deficient conduct set forth in his claim of ineffective assistance of counsel. We find that claim to be meritless for reasons assigned below.

The state court record and the trial transcript reveal that the evidence of petitioner's guilt was ample. Petitioner's exculpatory statement introduced into evidence at trial by the state alleged that Lane was responsible for the acts causing the victim's death. However, defendant did not seriously contest at trial his involvement in the beating and burning of the victim. The theory of his

⁵In the earlier stages of the criminal proceeding, petitioner was represented by Mr. Beevers, who met the time qualifications of Article 512. After Mr. Beevers withdrew as petitioner's attorney, Mr. Weidner along with Mr. John Tooley represented petitioner at hearings on pre-trial motions. At trial, Mr. Weidner had the assistance of Sam Stephens. Mr. Tooley had been a member of the bar for over twenty years. Mr. Stephens had been a member for four years, eleven months and a few weeks. Although Messrs. Tooley and Stephens were not appointed by the court to represent petitioner, a distinction perhaps with little difference, it would appear that petitioner was at all times represented by counsel within the spirit, if not the letter of Article 512.

defense was that he lacked the specific intent to commit first degree murder due to intoxication. Ms. Shano testified that she saw petitioner kick Ms. Arwood into the bathtub rendering her unconscious. (R., Tr., pp. 1146-49). She also saw petitioner pour hot water on Ms. Arwood, walk all over her back as she was lying on the floor and beat her with a belt. (R., Tr., pp. 1149-50). Ms. Shano also testified that she overheard petitioner say, "[I] can show you how cruel I can be..." just before she smelled something burning. (R., Tr., p. 1151). Ms. Shano also overheard conversations between Lane and petitioner which indicated petitioner set fire to Ms. Arwood. (R., Tr., p. 1152).

The fingerprints found on the can of lighter fluid used to set Ms. Arwood on fire belonged to petitioner. The Louisiana Supreme Court found the evidence "ample" from which a rational juror could have found that the defendant was engaged in the perpetration of aggravated arson and that he had acted with specific intent. *State v. Sawyer*, supra, 422 So.2d at 99. The court's determination is entitled to great weight. *Wingo v. Blackburn*, 786 F.2d 654 (5th Cir. 1986). Webster's New Collegiate Dictionary defines ample as "generous or more than adequate in size, scope, or capacity... generously sufficient to satisfy a requirement or need".

Petitioner does not address the deficiency of appellate counsel, both of whom he claims had not been admitted to practice for more than five years at the time of their representation of him.

The record reflects that these attorneys presented both meaningful and serious issues to the Louisiana Supreme Court in petitioner's appeal.

Petitioner does not suggest other issues appellate counsel might have urged on appeal. Petitioner must establish "...[t]hat counsel's errors were so serious that counsel was not functioning as the counsel guaranteed to the defendant by the sixth amendment." *McCrae v. Blackburn*, 793 F.2d 684 (5th Cir. 1986). Any error in the appointment of appellate counsel with more than five years experience to represent petitioner is likewise harmless beyond a reasonable doubt.

Petitioner's claim that he was denied equal protection of the law in the appointment of counsel with less than five years experience is without merit.

Petitioner raises several instances of alleged deficient conduct on the part of his counsel in his claim that he did not receive the effective assistance of counsel.

He claims that counsel:

- a) was admitted to practice for less than five years;
- b) objected to the prosecutor advising the jury panel during voir dire of the penalties for lesser included offenses;
- c) failed to object during voir dire to the prosecutor's reference to evidentiary facts that were not later established at trial;
- d) failed to conduct a meaningful voir dire;
- e) failed to discuss with petitioner the nature of the defense;
- f) failed to allow petitioner to testify during the guilt phase of the trial;

-14-

A - 104

- g) failed to adequately prepare defense witnesses for trial;
- h) failed to call an expert that would have been able to give an opinion as to the effect of alcohol on petitioner;
- i) failed to present a closing argument during the guilt phase of the trial;
- j) presented an unprepared defense during the penalty phase of trial;
- k) failed to object or move for mistrial during improper argument by prosecution during penalty phase of trial;
- l) failed to object to erroneous instructions given the jury by the court during guilt and penalty phase of trial; and
- m) failed to make effective closing argument during penalty phase of trial.

In order to prevail on a claim of ineffective assistance of counsel, petitioner must show: 1) that his counsel's performance was deficient; and, 2) that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Murray v. Maggio*, 736 F.2d 279 (5th Cir. 1984).

Under the Supreme Court's formulation of the required showing of prejudice,

"[T]he defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, *supra*, 104 S.Ct. at 2068.

If the Court finds that petitioner has made an insufficient showing as to either one of the two stages of inquiry, i.e. deficient performance or actual prejudice, the Court may dispose of the claim without addressing the other stage. *Strickland v. Washington*, *supra*, 104 S.Ct. at 2069-70.

-15-

A - 105

In determining whether counsel's performance falls below the objective standard of reasonableness, our scrutiny should be "highly deferential", recognizing "...strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance". Strickland v. Washington, supra, 104 S.Ct. at 2066; Marler v. Blackburn, 777 F.2d 1007 (5th Cir. 1985).

Petitioner may not simply allege prejudice, he must affirmatively prove it. Strickland v. Washington, supra, 104 S.Ct. at 2067; Celestine v. Blackburn, 750 F.2d 353 (5th Cir. 1984), cert denied, ___ U.S. ___, 105 S.Ct. 3490, ___ L.Ed.2d ___ (1985); Hayes v. Maggio, 699 F.2d 198 (5th Cir. 1983).

We now treat petitioner's individual claims of ineffective assistance of counsel.

a) Counsel's Admission To Practice For Less Than Five Years

Mere inexperience alone will not determine whether a defendant received effective assistance of counsel. The test rather is counsel's performance in representing the defendant. United States ex rel. Williams v. Twomey, 510 F.2d 634 (7th Cir. 1975), cert. denied, 423 U.S. 876, 96 S.Ct. 148, 46 L.Ed.2d 109; United States v. Radolato, 701 F.2d 915 (11th Cir. 1983).

Petitioner has not established that trial and appellate counsel's failure to meet the five year admission to practice minimum resulted in any prejudice to him. Counsel were effective. Petitioner does not show that the results of the trial or appeal would have been any different had counsel with more experience been appointed.

b) Counsel Objected To The Prosecutor Advising The Jury Panel During Voir Dire Of The Penalties For A Lesser Included Offense

Petitioner suggests that the jury should have been made aware that he could have been sentenced: 1) to life imprisonment, without benefit of parole, probation or suspension of sentence if it returned a guilty verdict of second degree murder; or, 2) twenty years imprisonment on a verdict of manslaughter. Petitioner does not explain, however, how this prejudiced him since it was possible for the jury to recommend a sentence of life imprisonment on his conviction of first degree murder. Petitioner's contention that the jury might have returned a verdict of manslaughter, had it known he could have received twenty years imprisonment, has even less support in light of the evidence.

We are convinced, in view of the evidence, that the verdict would not have been different had the jury been made aware of the alternate penalties.

c) Counsel Failed To Object During Voir Dire To The Prosecutor's Reference To Facts Not Later Established At Trial

Petitioner singles out two references made by the prosecutor during voir dire examination to support his claim. The references are to claims by the prosecutor that "...[S]he [the victim] had a hammer shoved up her vaginal area as well as other incidents"; and "she was halfway drowned in the bathtub and set on fire after she was raped". (R., Petition, pp. 12-13).

The second referenced statement above was not a mischaracterization of the evidence ultimately produced during the trial. There is support in the evidence offered at trial that the victim was "halfway" drowned in the bathtub and set on fire after she was raped.

There was no evidence introduced during trial, however, which would support the first referenced statement that a hammer was used in the attack upon the victim.

Had counsel objected to the remark during voir dire, the jury's verdict would not have been different. The reference by the prosecutor to the use of the hammer, viewed in perspective to the actual torture and brutality inflicted upon the victim, could have had only an inconsequential effect on the jury's verdict.

Defense counsel did request a mistrial during the testimony of a state witness who alluded to the possible use of a hammer during the attack on the victim. The court denied the motion and instructed the jury that up to that point in the trial, there had been no testimony about a hammer and to disregard the witness's comment. (R., Tr., pp. 1282-1285).

Petitioner suffered no prejudice by the prosecutor's earlier remark.

d) Counsel Failed To Conduct A Meaningful Voir Dire

Petitioner complains that counsel failed to inquire during voir dire examination of the prospective jurors' prior jury service and their attitude regarding the failure of a defendant to testify in his own behalf.

Petitioner does not articulate how he was prejudiced by counsel's failure to find out if a juror had prior jury service. It would be pure speculation to consider that one or more of the

selected jurors would have been excused if it was known that he or she had served on a prior jury.

Additionally, petitioner has not established if there were in fact any jurors who had prior jury service.

Likewise, counsel's failure to inquire of the jurors' attitude regarding a defendant's failure to take the stand does not entitle petitioner to relief herein.

Counsel did not plan to call petitioner to the stand during the guilt phase of the trial. He testified during the state evidentiary hearing that he did not ask the prospective jurors about their attitude toward a defendant not taking the stand on his behalf, to avoid emphasizing the fact that petitioner would not in fact testify. It was a tactical decision. (R., Evidentiary Hearing, July 12, 1985, pp. 146-47).

e) Counsel Failed To Discuss The Nature Of His Defense With Petitioner

Petitioner claims that counsel did not consult with him about his defense and refers to an affidavit filed in the state record as Exhibit "AA" in support of this claim.

The allegations in petitioner's affidavit belie any contention that he was not apprised of the defense that was going to be presented on his behalf. He admitted discussing the case with counsel on several occasions, and on one occasion was told that "alcohol psychosis" would be advanced as a defense to the crime.

Petitioner's claim that he was not advised of his defense before trial is contradicted by his own affidavit, as well as Mr. Weidner's testimony during the state evidentiary hearing.

f) Counsel Failed To Advise Petitioner Of His Right To Testify On His Own Behalf

Petitioner, in connection with this claim, complains that he was not given the opportunity by his attorney to make his own decision as to whether he would testify on his own behalf. Petitioner claims that he would have testified given the choice.

Petitioner, however, does not indicate what his testimony would have consisted of, had he been allowed to testify. He testified during the penalty phase of the trial that he remembered little about the events of the night. (R., Tr., p. 1508).

The fact of petitioner's prior conviction for involuntary manslaughter could have been revealed during the guilt phase of the trial had petitioner taken the stand, a factor that could not but further damage any defense petitioner presented. In fact, petitioner's prior conviction, and its possible revelation during the guilt phase of the trial was a major reason his counsel decided not to put him on the witness stand. (R., Evidentiary Hearing, July 12, 1985, p. 126).

Petitioner's exculpatory statement, given the police shortly after his arrest, in which he put the blame for the victim's injuries on his co-defendant was read to the jury during the state's case in chief.

Had petitioner testified at trial, he may have had difficulty in reconciling for the jury his defense of lack of intent to commit

the crime due to intoxication, and his prior statement that someone else committed the crime.

We cannot second-guess counsel's strategy in not calling petitioner to the stand. The decision not to do so was not outside the realm of effective representation.

Mr. Weidner testified during the state evidentiary hearing that he consulted with petitioner on several occasions concerning not calling him as a witness. (R., Evidentiary Hearing, July 12, 1985, p. 124-25). It was not brought out, however, if counsel, as claimed by petitioner, gave him an opportunity to make the decision himself as to whether he wanted to testify. Petitioner does not claim he made a request of his counsel to testify, he merely asserts he was not given an opportunity to make that choice.

Even assuming that petitioner in fact was not given the opportunity by counsel to make that decision, he has failed to establish that he was prejudiced by the alleged error. Petitioner does not indicate what his testimony would have been had he testified during trial.

g) Counsel Failed To Adequately Prepare Defense Witnesses For Trial

Petitioner complains that his attorney called only five witnesses in his defense and spent only one-half hour with two of those witnesses, his sister and brother-in-law, in preparing their testimony for trial.

Brevity of time spent by counsel in preparing a case is not of itself sufficient to provide relief to a habeas applicant. Schwander v. Blackburn, 750 F.2d 494 (5th Cir. 1985).

Petitioner does not indicate what additional facts would have been established at trial had counsel spent more time with the two witnesses mentioned above. It is unclear by petitioner's statement that "a total of only five defense witnesses were called to testify," whether he is complaining that other witnesses should have been called. One of petitioner's present counsel filed an affidavit in the state court proceedings that petitioner's sister gave her the names of several witnesses who would have been available to testify at petitioner's trial. (R., Application for Writs to Louisiana Supreme Court, No. 84 KP 0919, Exhibit S). This list of potential witnesses all appear to be relatives of petitioner. There are no allegations, however, as to what their expected testimony would be.

Without specific allegations of the expected testimony of other witnesses and some indication that they would have been available to testify at trial, petitioner has failed to establish prejudice.

h) Counsel Failed to Call An Expert To Give An
Opinion As To The Effect Of Alcohol On Petitioner

Petitioner, while acknowledging that his attorney obtained the testimony of two physicians in aid of his defense of toxic psychosis, complains that his attorney should have procured other experts who, presumably after examining petitioner, would be able to testify as to the effect alcohol has on petitioner.

The two experts who testified on petitioner's behalf were Doctors Albert DeVilliere and Genevieve Arneson, psychiatrists, who had been appointed to a pre-trial lunacy commission to examine petitioner. Each examined petitioner approximately for one-half hour

in connection with that earlier proceeding and concluded that petitioner understood the nature of the charges filed against him and was able to assist his attorney in his defense.

Counsel for petitioner was successful at trial in eliciting opinions from these two experts which supported the defense of toxic psychosis. (R., Tr., pp. 1337, 1338, 1409).

Petitioner complains, however, that these opinions were based upon a set of hypothetical facts only, and that counsel should have procured an expert who could have testified as to the actual effect of alcohol on him.

Petitioner does not suggest what type of examination would produce the type of results he seeks or that those results would even be obtainable.

Dr. DeVilliere testified both at trial and during the sanity commission proceeding that there are no tests to determine a man's intent or the effect of toxic psychosis on that intent at the time of the crime. He claimed that a physician would have to be at the scene of the crime during its commission to be in a position to render such an opinion. (R., Tr., pp. 436, 1314).

Petitioner offers no evidence that establishes he actually suffered from toxic psychosis to justify our considering his claim.

i) Counsel Failed to Present A Closing Argument
During The Guilt Phase of Trial

Petitioner complains that his attorney was deficient in not presenting a closing argument during the guilt phase of trial.

Mr. Weidner testified during the state evidentiary hearing that he made a deliberate decision not to give a closing argument based upon two separate considerations. First of all, he was knowledgeable of the prosecutor's reputation for presenting strong and damaging rebuttal arguments. Since the prosecutor had given what Weidner considered to be a "mild" closing argument, he hoped to prevent, by not giving a closing argument, the prosecutor presenting a stronger rebuttal. (R., Evidentiary Hearing, July 15, 1985, p. 128).

Secondly, Weidner realized the strong case the state had against his client as to his guilt and felt the chance of salvaging anything for his client was in the penalty phase where he hoped for a recommendation of life imprisonment. To further any possibility for success in the penalty phase, Weidner decided not to risk what credibility he may have had with the jury by advancing arguments as to petitioner's innocence that the jury might perceive to have been totally unsupportable.

While an attorney's decision to waive closing argument might ordinarily deprive a defendant of the effective assistance of counsel, we do find that to be the result in the case before us.

Mr. Weidner believed the case against his client on the guilt phase to be very strong. Prior counsel, Beevers, had withdrawn from the case after he and Sam Dalton, a Jefferson attorney experienced in the defense of capital cases, failed to convince petitioner to accept a plea bargaining agreement to plead to the lesser charge of second degree murder. They likewise had believed the case against petitioner to be very strong. (R., Evidentiary Hearing, July 15, 1985, p. 14-15.).

Under the circumstances, the jury could not help but to have understood the nature of petitioner's defense. They were apprised of it during voir dire and counsel's opening statement. The testimony of defense witnesses as to aspects of the theory of defense was simple and direct. Counsel's participation in the entire trial was quite active. See Martin v. McCotter, No. 85-1311, slip. op. 8385-86 (5th Cir. August 13, 1986).

We are convinced that had counsel presented a closing argument, the jury's verdict would not have been different.

j) Counsel Presented An Unprepared Defense During The Penalty Phase Of The Trial

Petitioner complains that counsel did not conduct a proper investigation in connection with the penalty phase of his trial which resulted in the failure to call other witnesses or present mitigating evidence.

With the possible exception of the names of relatives contained in his attorney's affidavit mentioned above, petitioner does not identify these additional witnesses or the substance of their testimony. He does not indicate what additional evidence his sister would have offered.

Petitioner does not furnish us any medical reports connected with his brief stay in a mental hospital some thirteen years prior to the commission of the crime. He does not claim he was treated for or suffered from any mental condition since that earlier hospitalization.

The fact that petitioner had been hospitalized was brought out during the testimony of petitioner's witnesses in the penalty phase of the trial.

Petitioner has not established prejudice in connection with the above issue.

k) Counsel Failed To Object Or Move For A Mistrial During Improper Argument By The Prosecutor During The Penalty Phase Of Trial

Petitioner, in support of the above claim, refers to statements made by the prosecutor which are set out in claims of alleged error in his application for relief, i.e., claims 4 and 5 below.

We find no prejudice to petitioner based upon the above alleged error for reasons that will be obvious when we treat this issue more fully in connection with petitioner's claims 4 and 5 below.

l) Counsel Failed To Object To Erroneous Instructions Given Jury By Court During Guilt And Penalty Phase Of Trial

Petitioner claims that counsel should have objected to the trial court's a) failure to instruct the jury as to how they should treat a defendant's failure to testify; b) instruction on intent; and, c) instruction defining principals.

We will treat below petitioner's complaints as to b and c above, in connection with related issues raised in claims 8 and 9.

As to counsel's failure to object to the court's charge to the jury in that it did not include a charge as to how the jury should treat a defendant's failure to testify on his behalf, Mr. Weidner testified during the state hearing that he purposely requested the court to omit that charge to avoid calling undue attention to the fact that petitioner did not take the stand. (R., Evidentiary Hearing, July 12, 1985, pp. 150-51). Mr. Weidner's decision falls within the definition of trial strategy.

If the particular charge had been included in the court's instructions, the result of the trial would not have been different.

m) Counsel Failed To Make An Effective Closing Argument During The Penalty Phase Of The Trial

Counsel's argument during the penalty phase of the trial is contained in approximately one typewritten page of the trial transcript.

Petitioner complains that the argument was cursory, perfunctory and unpersuasive. We conclude that it was unpersuasive because it was unsuccessful, but lack of success of itself would not result in a conclusion that counsel was ineffective.

The remarks of counsel were of a cursory and perfunctory nature, but petitioner has not established that the jury's recommendation would have been different had counsel dealt longer on mitigating factors favoring him. There was little available by way of mitigation in petitioner's favor.

4. PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT

Petitioner complains that the prosecutor was guilty of misconduct when he made references to the possibility of a pardon for petitioner if the jury recommended life imprisonment. Additionally, he claims that the assistant district attorney's appeal to a "war on crime", or "community expectation" argument to the jury prejudiced

him. The portions of the rebuttal argument to which petitioner objects follows:⁶

"At that point in time the only thing you will have to worry about is whether or not Robert Sawyer will ever be back on the streets of Jefferson Parish. The man's personality has already been formed. The statute speaks without benefit of probation, suspension, commutation of sentence. The statute (sic) does speak about a pardon. The statute doesn't speak about a commutation so don't think that if you vote for first degree murder, I'm sorry, for life imprisonment that that will be the end of this matter as it relates to Robert Sawyer because it's not. Tr.Tr. 986:14-29.

...if the law which we have in this state is to have any piece [sic], if it's to have any meaning, if it's to have any impact on all the other people out on the streets that are committing crimes and murders and rapes and robberies, that is affecting you and me and every member of your family. That has made the good people of this community become prisoners in their own homes in putting bars up in their own homes. They are the ones who are suffering. If the statute is to have any weight behind it at all, my God, ladies and gentlemen this is the time to draw the lines because if a man can commit this type of crime, do this type of thing to this woman in front of two children with a prior conviction for killing a four year old child, then what are the people of this Parish to believe. They are going to believe what a lot of people believe, there is a lot of law and a lot of judges but the judges are letting the criminals out, the law never has any affect.... Tr.Tr. 987-17-29; 988:1-6." (R., Petition, p. 17).

⁶Petitioner also refers us in his petition to the prosecutor's entire closing argument and rebuttal, both in the guilt and penalty phase of the trial in support of his claim of prosecutorial misconduct without pointing out specific portions of the argument as constituting error. Mere conclusory allegations of error are insufficient to support a claim for relief. See *Ross v. Estelle*, 694 F.2d 1008 (5th Cir. 1983).

-28-

A - 118

The Louisiana Supreme Court discussed in its opinion affirming petitioner's conviction, the prosecutor's reference to the possibility of a pardon, and found petitioner's claim to be without merit.

That Court held:

"...There is another factor in this case which we have considered, even though there was no contemporaneous objection, because of the possibility of prejudicial influence on the jury's recommendation of death. *State v. Willie*, 410 So.2d 1019 (La. 1982). In the final closing argument, the district attorney alluded briefly to the possibility of pardon. In prior cases (decided after this trial), we have warned against such an argument, and we have ordered new penalty hearings in cases in which we concluded that the particular argument constituted an improper influence on the jury. See *State v. Lindsey*, 404 So.2d 466 (La. 1981), and *State v. Willie*, above. We have never held, however, that an automatic reversal of the death penalty must follow the mere mention of the fact that R.S. 14:30's prohibition against probation or parole for one under sentence of life imprisonment does not exclude executive pardon. Each case must be decided on its own facts and circumstances.

Here, the cryptic and brief comment came in response to the defense attorney's final plea to the jury to spare defendant's life and to sentence him to the 'living death of life imprisonment', which implied that defendant could never be released. Had the prosecutor done more than make a passing responsive comment on the possibility of a pardon, perhaps a reversal would be warranted. However, the prosecutor did not dwell on the speculative prospect of future action by the executive nor suggest to the jury that the speculative possibility of future release is a valid reason for recommending the death sentence. Thus, in the context of the entire argument, the prosecutor's responsive remark neither deflected the jury's attention from the ultimate significance and finality of the penalty recommendation nor misguided the jury's sentencing discretion by the introduction of inappropriate considerations." [Footnotes omitted]. *State v. Sawyer*, supra, 422 So.2d at 104.

-29-

A - 119

We do not disagree with the Supreme Court's conclusion on this issue. Nor do we find merit to petitioner's claim that the prosecutor's use of a "war on crime" argument or his appeal to the jury that the community might not understand a verdict which did not impose the death penalty prejudiced him. See *Whittington v. Estelle*, 704 F.2d 1418 (5th Cir. 1983), cert. denied, 464 U.S. 983, 104 S.Ct. 428, ___ L.Ed.2d ___ (1983).

A prosecutor is permitted in closing argument to state to the jury what he believes to have been established and to comment fairly on it. *Whittington v. Estelle*, supra.

Prejudicial comments by a prosecutor in closing argument will justify federal habeas relief only if the error was material in the sense of a crucial, critical and highly significant factor. *Washington v. Estelle*, 648 F.2d 276 (5th Cir. 1981), cert. denied, 454 U.S. 899, 102 S.Ct. 402, 70 L.Ed.2d 216 (1981); *Lowery v. Estelle*, 696 F.2d 333 (5th Cir. 1983).

A prosecutor's improper argument to the jury

"...[d]oes not present a claim of constitutional magnitude which is cognizable in a proceeding under 28 U.S.C. 2254 unless such argument is so prejudicial that the appellant's state court trial was rendered fundamentally unfair within the meaning of the Due Process Clause of the Fourteenth Amendment." *Whittington v. Estelle*, supra, at 1421.

In viewing the remarks of the prosecutor in the context of the entire trial, which we must, we conclude that the remarks were not so prejudicial as to render the trial fundamentally unfair.

Since petitioner was not prejudiced by the remarks, petitioner is not entitled to relief on his claim of ineffective assistance of counsel presented in claim 3, k above.

-30-

A - 120

5. PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT

Petitioner additionally complains of the following closing remarks by the prosecution as being prejudicial:

"...you yourself will not be sentencing Robert Sawyer to the electric chair. What you are saying to this Court, to the people of this Parish, to any appellate court, the Supreme Court of this State, the Supreme Court possibly of the United States, that you the people as a fact finding body from all the facts and evidence you have heard in relationship to this man's conduct are of the opinion that there are aggravating circumstances as defined by the statute, by the State legislature that this is the type of crime that deserves that penalty. It is merely a recommendation so try as he may, if Mr. Weidner tells you that each and every one of you I hope you can live with your conscience and try and play upon your emotions, you cannot deny, it is a difficult decision. Tr.Tr. 982: 6-21.

You are the people that are going to take the initial step and only the initial step and all you are saying to this court, to the people of this Parish, to this man, to all the Judges that are going to review this case after this day, is that you the people do not agree and will not tolerate an individual to commit such a heinous and atrocious crime to degrade such a fellow human being without the authority and the impact, the full authority and impact of the law of Louisiana. All you are saying is that this man from his actions could be prosecuted to the fullest extent of the law. No more and no less. Tr.Tr. 984:10-21." (R., Petition, p. 18).

The issue raised by the above quoted argument of the prosecutor is a vague reference to the possible review of the jury's verdict by a higher court.

-31-

A - 121

An argument by a prosecutor, in the penalty phase of a capital case, which suggests to the jury that its responsibility is lessened by appellate review has been condemned in *Caldwell v. Mississippi*, ___ U.S. ___, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985).

The state prosecutor in the case sub judice made another reference to possible review of the jury's verdict by a higher court of which petitioner does not complain.

"It's all your doing. Don't feel otherwise. Don't feel like you are the one, because it is very easy for defense lawyers to try and make each and every one of you feel like you are pulling the switch. That is not so. It is not so and if you are wrong in your decision believe me, believe me there will be others who will be behind you to either agree with you or to say you are wrong so I ask that you do have the courage of your convictions. You've done the right thing so far. There can be no doubt that Robert Sawyer committed this crime. The evidence is strong and convincing although he still denies that. He still states he was so intoxicated he doesn't remember anything about this crime. He gave a statement two hours after the crime admitting or at least telling everyone about it. I could have cross examined him and gone more into it and gotten more and more lies but his guilt has already been decided.

I ask that you consider what I have just told you and I may or may not be back to speak to you in a brief rebuttal after Mr. Weidner argues. Thank you." (R., Tr., p. 1519).

Because petitioner did not complain of the comments immediately above, either in his habeas application filed herein or his state habeas proceedings, we cannot consider whether those comments present any grounds for relief.

Although petitioner has not urged error in the prosecutor's comments quoted immediately above, we should, however, consider the possible effect of those comments on the outcome of the proceedings since we are required to view the comments of which petitioner complains in light of the entire record.

-32-

A - 122

Petitioner's counsel did not object to the prosecutor's comments at the time they were made. The contemporaneous objection rule would not prevent our consideration of the claimed error, as the Louisiana courts themselves in a death case would not be constrained from considering the merits of the issue. *State v. Willie*, supra.⁷

While the prosecutor's comments in the instant case dangerously approach reversible error, we do not believe it actually reaches that mark.

The remarks herein are distinguishable from the prosecutor's remarks condemned in *Caldwell*. In *Caldwell*, the assistant district attorney made the following argument in response to the defendant advising the jury of their awesome responsibility in imposing the death penalty:

'ASSISTANT DISTRICT ATTORNEY:

Ladies and gentlemen, I intend to be brief. I'm in complete disagreement with the approach the defense has taken. I don't think its (sic) fair. I think its (sic) unfair. I think the lawyers know better. Now, they would have you believe that you're going to kill this man and they know--they know that your decision is not the final decision. My God, how unfair can you

⁷In fact, in the case sub judice, the Louisiana Supreme Court sua sponte noticed a potential problem with the prosecutor's reference to a possible pardon despite the absence of a contemporaneous objection. *Sawyer*, supra, 422 So.2d at 104. It is perhaps significant that the Louisiana Supreme Court, in fulfilling their duty in death cases to view the record for any apparent error in the record, did not consider apparently that the remarks petitioner complains of above were significantly prejudicial.

-33-

A - 123

be? Your job is reviewable. They know it.
Yet they ...

'COUNSEL FOR DEFENDANT:
Your Honor, I'm going to object to this statement. It's out of order.

'ASSISTANT DISTRICT ATTORNEY:
Your Honor, throughout their argument, they said this panel was going to kill this man. I think that's terribly unfair.

'THE COURT:
Alright, go on and make the full expression so the Jury will not be confused. I think it proper that the jury realizes that it is reviewable automatically as the death penalty commands. I think that information is now needed by the Jury so they will not be confused.

'ASSISTANT DISTRICT ATTORNEY:
Throughout their remarks, they attempted to give you the opposite, sparing the truth. They said "Thou shall not kill." If that applies to him it applies to you, insinuating that your decision is the final decision and that they're gonna to take Bobby Caldwell out in the front of this Courthouse in moments and string him up and that is terribly, terribly unfair. For they know, as I know, and as Judge Baker has told you, that the decision you render is automatically reviewable by the Supreme Court. Automatically, and I think its (sic) unfair and I don't mind telling them so.' Caldwell v. Mississippi, supra, at 2637-38.

A consideration by the Caldwell court was that the prosecutor's remarks in that case were "focused, unambiguous and strong" and because the trial judge, not only failed to give a curative instruction, but openly approved the prosecutor's remarks. Caldwell v. Mississippi, supra, at 2645.

The comments complained of herein were ambiguous and not merely as strong as the comments in Caldwell. The court's

instructions to the jury in the case herein did not lend support to the prosecutor's statements concerning appellate review. To the contrary, the trial court, after meticulously instructing the jurors on the factors they were to consider in their deliberations, concluded with the injunction, that "[I]t is your responsibility in accordance with the principles of law I have instructed whether the defendant should be sentenced to death or to life imprisonment." [Emphasis added]. (R., Tr., p. 1527).

The prosecutor's remarks complained of herein, while suggesting possible appellate review, were not sufficient to form a conclusion that the jury's responsibility was lessened by appellate review. The prosecutor told the jury in effect that you [the jury] by recommending the death penalty will be telling any court that reviews this case that "...[t]his man from his actions could be prosecuted to the fullest extent of the law". (R., Tr., p. 1518).

Reference to possible appellate review should not result, in all cases, in an automatic reversal of a death penalty.

As observed in State v. Mattheson, 407 So.2d 1150, 1165 (La. 1981), cert. denied, 463 U.S. 1229, 103 S.Ct. 3571, 77 L.Ed.2d 1412 (1983); quoting State v. Berry, 391 So.2d 406 (La. 1980), cert. denied, 451 U.S. 1010, 101 S.Ct. 2347, 68 L.Ed.2d 863 (1981) "...virtually every person of age eligible for jury service knows that death penalties are reviewed on appeal. There is no absolute prohibition against references to this fact of common knowledge, and the court should not impose an absolute prohibition, since such a reference does not necessarily serve to induce a juror to disregard

his responsibility". See also *Moore v. Maggio*, 740 F.2d 308, 320 (5th Cir. 1984); on subsequent application for habeas relief, 774 F.2d 97, 98 (5th Cir. 1985).

Although *Mattheson* was decided prior to *Caldwell*, its rationale appears to comport with the holding in *Caldwell*.

Even considering the prosecutor's remarks in connection with the comments appearing on page 1519 of the trial transcript, petitioner was not prejudiced. Those later comments, although "hinting" that an appellate court might have the final decision on the imposition of the death penalty, the comments are ambiguous at best.

The prosecutor told the jury:

"...[a]nd if you are wrong in your decision, believe me, believe me there will be others who will be behind you to either agree with you or to say you are wrong so I ask that you do have the courage of your convictions."
(R., Tr., p. 1519). [Emphasis added].

The above quote, when viewed as a whole, would not necessarily suggest to the jury that its responsibility is lessened, considering the prosecutor's statement to the jury to "...have the courage of your convictions".

The standard to be employed in determining whether prejudice resulted from alleged improper remarks by the prosecutor, condemned in *Caldwell*, is the "reasonable probability" test for determining prejudice established by *Strickland v. Washington*, supra. See

Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985) en banc; *Bowen v. Kemp*, 769 F.2d 672 (11th Cir. 1985), rehearing denied, 776 F.2d 1486 (commenting that there is no incompatibility between the standard enunciated in *Caldwell* and that established in *Strickland*). . rehearing en banc denied, 778 F.2d 623 (11th Cir. 1985).

The defendant must show under the appropriate standard, "...that there is a reasonable probability that, but for counsel's [prosecutor's] unprofessional errors, the result of the proceeding would have been different: a reasonable probability is a probability sufficient to undermine confidence in the outcome". *Strickland v. Washington*, supra, 104 S.Ct. at 2068.

In the instant case, the jury found two aggravating circumstances to support its recommendation of the imposition of the death penalty, when only a finding of one would have been sufficient. The evidence of defendant's guilt was ample. There was little in the way of mitigating evidence. The court's instructions properly directed the jury's attention to those factors it was to consider in arriving at a recommendation.

The Louisiana Supreme Court, upon review of the record on appeal, determined:

"We are convinced ... that the jury's recommendation was not reached arbitrarily and was not based on improper considerations, and we have been shown no basis for overturning the recommendation on appeal." *State v. Sawyer*, supra, 422 So.2d at 106.

The court's finding is entitled to great weight. *Wingo v. Blackburn*, supra.

We conclude, based on the above considerations, that there is no reasonable probability, that but for the prosecutor's alleged professional errors, the recommendation of the jury would have been different.

For these same reasons, we conclude that petitioner has failed to establish prejudice on the claim of ineffective assistance of counsel raised in ground 3, k above.

6. FAILURE TO ALLOW PETITIONER THE RIGHT TO MAKE
DECISION AS TO WHETHER HE WOULD TESTIFY ON HIS
OWN BEHALF

Petitioner complains that his attorney made the decision on his own as to whether or not petitioner would testify during the guilt phase of the trial without advising him that he had a right to make that decision himself.

A related issue involving a claim of ineffective assistance of counsel has been disposed of above.

Petitioner does not claim that he ever made a request of his counsel to be allowed to testify. Petitioner does not indicate what his testimony would have been had he made the decision to testify. Petitioner has not established that he was prejudiced by the alleged error.

7. TRIAL COURT'S FAILURE TO INSTRUCT THE JURY AS TO
HOW THEY SHOULD TREAT A DEFENDANT'S FAILURE TO TESTIFY

Petitioner claims that he was prejudiced by the trial court's failure to include an instruction to the jury that a defendant is not required to testify and that no presumption of guilt may be drawn from the fact that a defendant does not testify.

The record reflects that the state judge's instructions to the jury did not contain such a charge.

Mr. Weidner testified at the evidentiary hearing that he requested the trial judge not to include the above charge in the court's instructions as a strategy move to avoid undue attention being drawn to the fact that defendant did not take the stand in his defense.

No error was committed by the court for failing to include the charge since it was purposefully omitted at the request of defense counsel.

We have already disposed of petitioner's allegations that counsel's request to the court to omit the charge constituted ineffective assistance of counsel.

8. TRIAL COURT'S INSTRUCTION IMPROPERLY RELIEVED
STATE OF BURDEN OF PROOF

Petitioner complains that the following instruction given the jury by the trial court had the effect of relieving the state from its burden of proving "specific intent" an element of the crime.

"A specific intent to kill may be implied where there are no external signs of the intent beyond the mere facts of the homicide itself, if there were no just grounds for the killing, when the killing was without provocation or upon so slight a provocation as not to justify the killing. Tr.T. 926:19-24." (R., Tr., p. 1481).

For a trial error to be reviewable in Louisiana, an objection must be made at the time of its occurrence. LSA Louisiana Code of Criminal Procedure Art. 841. Absent cause for the procedural default and actual prejudice from the error, principles of comity and federalism prevent federal courts from granting habeas corpus relief

to a state prisoner whose claim would not be reviewable in the state court because of the default. *Engle v. Isaac*, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982); *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). Petitioner does not allege cause for the failure to object to the charge. A claim that the "cause" was due to counsel's ineffectiveness is not sufficient to establish cause. *Washington v. Estelle*, 648 F.2d 276 (5th Cir. 1981), cert. denied, 454 U.S. 899, 102 S.Ct. 402, 70 L.Ed.2d 216 (1981). See *Weaver v. McKaskle*, 733 F.2d 1103 (5th Cir. 1984); *Stokes v. Procunier*, 744 F.2d 475 (5th Cir. 1984).

Even if cause existed for failure to object to the charge, petitioner would not be entitled to relief on the above claim. The complained of charge quoted above is only a small part of the entire instruction given the jury on "specific intent". The quote is taken out of context. A review of the court's entire charge on that element of the offense reveals that the jury was instructed how they may treat various factual circumstances [including the one petitioner complained of] in order to determine whether a defendant had specific intent to kill someone. [Emphasis added]. The court concluded by telling the jury: "Therefore you should determine whether or not there was criminal intent by considering all of the facts and circumstances of this case". (R., Tr., p. 1482).

Because we would determine the charge complained of to have been proper, petitioner's companion claim that counsel's failure to object to the charge constituted ineffective assistance of counsel is without merit.

9. TRIAL COURT'S INSTRUCTION IMPROPERLY RELIEVED
STATE OF BURDEN OF PROOF

Petitioner complains that the following charge on the law of principals improperly relieved the state of its burden to prove specific intent.

"All persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission or directly or indirectly counsel or procure another to commit the crime are principals.

In other words, to be concerned in the commission of a crime, it must be shown that the person or persons charged did something knowingly and intentionally in furtherance of the common design, or to put it another way, that he or they aided, abetted and assisted in the perpetration of the offense.

All persons knowing the unlawful intent of the person committing the crime, who were present, consenting thereto, and aiding and abetting either by furnishing the weapons of attack, encouraging by words or gestures, or endeavoring at the time of the commission of the offense, to secure the safety or concealment of the offender, are principals and equal offenders and subject to the same punishment. (T.T. 931:5-24)." [R., Tr., p. 1466].

No contemporaneous objection was made in connection with the above charge to the jury and there is no objection of cause for the failure to object to the charge. This claim as well as petitioner's

companion claim of counsel's failure to object to the above charge is without merit.⁸

10. TRIAL COURT ERRED IN EXCUSING A JUROR WHO
EXPRESSED ONLY A GENERAL OPPOSITION TO THE
DEATH PENALTY

Petitioner complains that the court excused a prospective juror after she expressed only a general opposition to the imposition of the death penalty.

⁸Petitioner would not succeed on the merits of this claim. Petitioner argues in his brief that the above instruction might have caused the jury to have found him guilty if they believed that he failed to prevent Lane from beating the victim. Petitioner fails to include the trial court's complete charge on principals which include an instruction that a person cannot be considered a principal under the circumstances suggested by petitioner. (R., Tr., p. 1467). Clark v. Louisiana State Penitentiary, 694 F.2d 75 (5th Cir. 1982), reh'g denied, 697 F.2d 699 (1983) cited by petitioner in support of his claim involved a conspiracy instruction and its holding is inapposite to the conclusion we reach herein. In the instruction given herein, the court charged the jury that a principal is one who "...[k]nowing the unlawful intent of the person committing the crime..., [and] ...consenting thereto...." aids and abets in the commission of the crime. (R., Tr., p. 1466). The prosecutor referred to the law or principals in his closing argument. (R., Tr., p. 1444). However, it was in reference to petitioner being a principal in the aggravated rape of Ms. Arwood. The argument was harmless, since the jury did not find the aggravated rape to have been an aggravating circumstance after the penalty hearing. The evidence at trial established that petitioner did not participate in the crime merely as an aider and abetter. He himself beat the victim, caused her to become unconscious when he kicked her into the bathtub, poured the lighter fluid on her and lit her on fire.

The juror, Gwendolyn Lee, when asked her feelings toward the death penalty, replied:

"What are your feelings about capital punishment?"

A. I don't agree with it.

Q. You say you don't agree with it. That is regardless of what the evidence may show, no matter how heinous of a crime, you are telling me you are morally or religiously, no matter what the evidence may show you could not even consider the imposition of the death penalty?

A. No I don't think it is fair.

Q. You don't think it's fair. You have had this belief for quite some time?

A. Yes.

Q. Is this a religious belief, is the death penalty contrary to your religion?

A. Yes.

Q. You have strong contrary objections to it no matter what the evidence may show.

A. That is right.

* * *

THE COURT:

Let me explain this to you, Mrs. Lee. We do have a death penalty in Louisiana. That doesn't mean it

would be imposed in this case or any other case. What Mr. Weidner is asking you if the facts of this case indicate that the death penalty should be imposed, could you vote for it under those circumstances?

MRS. LEE:

I really don't think I could.

THE COURT:

You don't think you could?

MRS. LEE:

No." (R., Tr., pp. 811-813).

The inquiry that we must make to determine if a juror may be excluded for his or her views on capital punishment is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. *Wainwright v. Witt*, ___ U.S. ___, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985); *Wicker v. McCotter*, 783 F.2d 487 (5th Cir. 1986).

This test is to be applied primarily by the trial judge and his determination that a juror should be excused because of his or her views on capital punishment is accorded a presumption of correctness under 28 U.S.C. §2254(d). *Wicker v. McCotter*, supra, at 493.

There is support for the trial court's determination that Mrs. Lee's views on capital punishment might substantially impair her performance as a juror.

11. VIOLATION OF PETITIONER'S RIGHTS UNDER EIGHTH AND FOURTEENTH AMENDMENT WHEN ONE OF AGGRAVATING CIRCUMSTANCES NOT SUPPORTED BY EVIDENCE

The issue petitioner raises under this claim is essentially a complaint that he was prejudiced in the penalty phase of his trial by the introduction of a crime, the involuntary manslaughter of a child, which was unrelated to any aggravating circumstances upon which the jury could find in imposing the death penalty.⁹

Although petitioner does not articulate the constitutional error present in this claim, it would appear that he is complaining of the same error that was raised in his direct appeal and on which the United States Supreme Court remanded to the Louisiana Supreme Court for further consideration in light of the former Court's holding in *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). *Sawyer v. Louisiana*, 463 U.S. 1223, 103 S.Ct. 3567, 77 L.Ed.2d 1407 (1983).

⁹It is unclear from the petition filed by petitioner whether he is also complaining that evidentiary support for all of the aggravating circumstances found by the jury was required. This issue, if raised, is without merit. This issue was treated fully in petitioner's direct appeal. The Louisiana Supreme Court held that an "...[a]dequately supported finding of the existence of one aggravating circumstance is alone sufficient to place defendant in that category of offenses properly exposed to the possibility of the death sentence. See *Williams v. Maggio*, 679 F.2d 381 (5th Cir. 1982) (en banc)." *State v. Sawyer*, 422 So.2d at 101-102.

The court in Zant held inter alia that a death sentence based upon two or more statutory qualifying grounds, one of which was later determined to be invalid, would not automatically require reversal of the death penalty unless it was determined that the deficient ground was invalidated on the basis it involved constitutionally protected activity, or the penalty was arbitrary and capricious because the invalidated ground involved the introduction of evidence not otherwise admissible.

On remand, the Louisiana Supreme Court held that the holding in Zant did not preclude the affirmance of the imposition of the death penalty in petitioner's case since the evidence of the manslaughter conviction, even if erroneously admitted to support one of the aggravating circumstances, was properly admitted to shed light on petitioner's character. Sawyer v. Louisiana, 442 So.2d 1136 at 1139-40.

A defendant's character constitutes valid considerations by the jury during the penalty phase of the trial. LSA Louisiana Code of Criminal Procedure Art. 905.2.

Petitioner's application for writ of certiorari to the United States Supreme Court from the decision of the state court after remand was denied. Sawyer v. Louisiana, ___ U.S. ___, 104 S.Ct. 1719, ___ L.Ed.2d ___ (1983).

Petitioner does not raise a constitutional question under the present claim as the evidence of manslaughter conviction was properly admissible under Louisiana law to establish petitioner's character, an important and relevant issue during the penalty phase of the trial.

12. INADMISSIBLE EVIDENCE WAS INTRODUCED DURING PENALTY PHASE OF TRIAL

Petitioner next complains about the prosecutor's reference during the penalty phase of the trial to the hearsay statements of uncalled witnesses, that the child, who was the victim of the Arkansas manslaughter conviction, was the victim of prior physical abuse at the hands of petitioner.

Petitioner refers in his petition to the following statements of the prosecutor as objectionable:

"If I were to tell you that I have in my custody the District Attorney's file from Arkansas relating to that conviction where Robert committed a homicide of a four year old girl and if I told you in this file I have statements of six people that Laura Durham, a four year old child, was an abused child, that (sic) constantly beaten by your brother, would you believe those six people? (See T.T. p. 961)." (R., Tr., p. 1496).

"I will read to you a hospital report in reference to little Laurie. Four year old white female, Miss Laura Sawyer arrived at the emergency room on December 4, 1973 at 1:44 p.m. She was brought to the emergency room by Robert Sawyer. The emergency room recorded her address as such and such...." See T.T. 961-962. (R., Tr., p. 1496-97).

Petitioner goes on to complain that subsequent to the second statement quoted above, the prosecutor elicited testimony from the state's witness about information that the child was the victim of prior abuse, which information was contained in the hospital report prepared on the date the child was admitted with her fatal injury.

The prosecutor apparently used this material in an attempt to counteract the favorable testimony of petitioner's sister that he took good care of the child.

Petitioner admitted in his testimony during the penalty phase of the trial that the child did have bruises on her body the day she was brought to the hospital. He denied that the prior injuries were caused by him, but laid the blame on the child's mother.

Petitioner did not object at trial to the testimony of which he now complains herein. The contemporaneous objection rule is not an issue in considering this claim, however, since the state has not raised the rule in connection with this claim in its response to the petition. See *Miller v. Estelle*, 677 F.2d 1080 (5th Cir. 1982), cert. denied, 459 U.S. 1072, 103 S.Ct. 494, 74 L.Ed.2d 636 (1982).

Hearsay testimony, with certain limited exceptions, is generally inadmissible. We can only conclude, without any suggestion to the contrary by the respondent, that the statements and testimony complained of herein were inadmissible.

The admission of the testimony complained of above must have resulted in a denial of fundamental fairness to entitle him to habeas corpus relief in this Court. *Scott v. Maggio*, 695 F.2d 916 (5th Cir. 1983).

"...[t]he mere erroneous admission of prejudicial testimony does not in itself, justify federal habeas relief unless it is 'material in the sense of a crucial, critical, highly significant factor,' in the context of the entire trial." *Menzies v. Procnier*, 743 F.2d 281, 288 (5th Cir. 1984) quoting *Porter v. Estelle*, 709 F.2d 944, 957 (5th Cir. 1983).

Petitioner admitted that he had spanked the child with a belt on several occasions prior to her death. Any reference by the prosecutor, in light of that admission, that he had statements from six people that petitioner constantly beat the child was harmless.

Petitioner has failed to demonstrate fundamental fairness.

Petitioner additionally complains about the use, during his cross-examination, of a prior statement he gave in connection with the Arkansas case. He claims that the prosecutor introduced the statement without first establishing at trial that the statement was voluntary.

Petitioner failed to establish prejudice. The burden of proof in an habeas application is upon the habeas petitioner. *Walker v. Maggio*, 738 F.2d 714 (5th Cir. 1984), cert. denied, ___ U.S. ___, 105 S.Ct. 793, ___ L.Ed.2d ___ (1985); *Hayes v. Maggio*, 699 F.2d 198 (5th Cir. 1983). Petitioner has set forth no facts which would suggest that the prior statement was not voluntary.

13. PETITIONER'S SENTENCE IS EXCESSIVE AND DISPROPORTIONATE
14. PETITIONER'S SENTENCE IS ARBITRARY AND CAPRICIOUS
15. ELECTROCUTION IS A CRUEL AND UNUSUAL MEANS OF PUNISHMENT
16. PETITIONER'S SENTENCE IS INVIDIOUSLY DISCRIMINATORY
17. CAPITAL PUNISHMENT IS AN EXCESSIVE PENALTY
18. THE CUMULATIVE EFFECT OF VIOLATIONS OF PETITIONER'S RIGHTS IS IN ITSELF A VIOLATION OF PETITIONER'S CONSTITUTIONAL RIGHTS

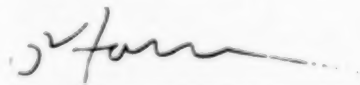
The grounds for relief raised in the above six claims are conclusory in nature. Petitioner offers no support in fact or law to justify their consideration.

RECOMMENDATION

It is recommended that the application for writ of habeas corpus filed on behalf of petitioner, Robert Sawyer, be DENIED and that the stay of execution be VACATED.

Failure to file written objections to the proposed findings and recommendations contained in this report within ten days from the date of its service shall bar an aggrieved party from attacking the factual findings on appeal. *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. 1982).

New Orleans, Louisiana, this 8 day of September, 1986.


RONALD A. FONSECA
United States Magistrate

-50-

A - 140

CAPITAL SENTENCING
Ch. 3

Art. 905.8

Art. 905.8. Imposition of sentence

The court shall sentence the defendant in accordance with the recommendation of the jury. If the jury is unable to unanimously agree on a recommendation, the court shall impose a sentence of life imprisonment without benefit of probation, parole or suspension of sentence.

Added by Acts 1976, No. 694, § 1.

445

A - 141

CAPITAL SENTENCING
Ch. 3

Art. 905.9

4. Remand
Upon finding reversible error in post-verdict sentencing hearing in a homicide prosecution, reviewing court should not reverse conviction, but only sentence of death, and should remand case in order that trial court may resentence convicted defendant to life imprisonment without benefit of probation, parole, or suspension of sentence. State v. English, Sup 1979, 367 So 2d 815.

Art. 905.9. Review on appeal
The Supreme Court of Louisiana shall review every sentence of death to determine if it is excessive. The court by rules shall establish such procedures as are necessary to satisfy constitutional criteria for review.
Added by Acts 1976, No. 694, § 1.

Supreme Court Rule 28

Rule 905.9.1. Capital sentence review (applicable to La.Cr.P. Art. 905.9)

Section 1. Review Guidelines. Every sentence of death shall be reviewed by this court to determine if it is excessive. In determining whether the sentence is excessive the court shall determine:

- (a) whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors, and
- (b) whether the evidence supports the jury's finding of a statutory aggravating circumstance, and
- (c) whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Section 2. Transcript, Record. Whenever the death penalty is imposed a verbatim transcript of the sentencing hearing, along with the record required on appeal, if any, shall be transmitted to the court within the time and in the form, insofar as applicable, for transmitting the record for appeal.

Section 3. Uniform Capital Sentence Report; Sentence Investigation Report.

(a) Whenever the death penalty is imposed, the trial judge shall expeditiously complete and file in the record a Uniform Capital Sentence Report (see Appendix "B"). The trial court may call upon the district attorney, defense counsel and the department of probation and parole of the Department of Corrections to provide any information needed to complete the report.

(b) The trial judge shall cause a sentence investigation to be conducted and the report to be attached to the uniform capital sentence report. The investigation shall inquire into the defendant's prior delinquent and criminal activity, family situation and background, education, economic and employment status, and any other relevant matters concerning the defendant. This report shall be sealed, except as provided below.

(c) Defense counsel and the district attorney shall be furnished a copy of the completed Capital Sentence Report and of the sentence investigation report, and shall be afforded seven days to file a written opposition to their factual contents. If the opposition shows sufficient grounds, the court shall conduct a contradictory hearing to resolve any substan-

Art. 905.9

CODE OF CRIMINAL PROCEDURE
Title 30

tial factual issues raised by the reports. In all cases, the opposition, if any, shall be attached to the reports.

(d) The preparation and lodging of the record for appeal shall not be delayed pending completion of the Uniform Capital Sentence Report.

Section 1. Sentence Review Memoranda; Form; Time for Filing.

(a) In addition to the briefs required on the appeal of the guilt determination trial, the district attorney and the defendant shall file sentence review memoranda addressed to the propriety of the sentence. The form shall conform, insofar as applicable, to that required for briefs.

(b) The district attorney shall file the memorandum on behalf of the state within the time provided for the defendant to file his brief on the appeal. The memorandum shall include:

- i. a list of each first degree murder case in the district in which sentence was imposed after January 1, 1976. The list shall include the docket number, caption, crime convicted, sentence actually imposed and a synopsis of the facts in the record concerning the crime and the defendant.
- ii. a synopsis of the facts in the record concerning the crime and the defendant in the instant case.
- iii. any other matter relating to the guidelines in Section 1.

(c) Defense counsel shall file a memorandum on behalf of the defendant within the time for the state to file its brief on the appeal. The memorandum shall address itself to the state's memorandum and any other matter relative to the guidelines in Section 1.

Section 5. Remand for Expansion of the Record. The court may remand the matter for the development of facts relating to whether the sentence is excessive.

Added Nov. 22, 1977, eff. Jan. 1, 1978.

Cross References

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Aggravating circumstances 8
Argument and conduct of counsel 10, 11
In general 10
Reference by prosecutor to review 11
Burden of proof 12
Construction and application 2
Mitigating circumstances 9
Objections 5
Prejudice or arbitrary factors 7
Presumptions and burden of proof 12
Purpose of review 3
Reference by prosecutor to review, argument and conduct of counsel 11
Scope of review 4
Similar cases 6

Supreme Court Opinions in Death Penalty Cases Since
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